Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

BOSTON UNIVERSITY,

Petitioner,

vs.

UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, AND ALTEC, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of New Jersey

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where the New Jersey rule governing *pro hac vice* admission has been declared ambiguous and in need of clarification by the Supreme Court of New Jersey, is the rule's retroactive application barring Robert B. Smith Esq., an attorney in good standing of the Commonwealth of Massachusetts, from appearing *pro hac vice* in New Jersey violative of the Due Process Clause of the United States Constitution?

2. Does New Jersey's law requiring Mr. Smith, a Massachusetts attorney, to pay 17 years of arrearages to the New Jersey Lawyers' Fund for Client Protection in order to be admitted *pro hac vice*, violate the Privileges and Immunities Clause of the United States Constitution?

3. Under the Equal Protection Clause of the United States Constitution, is there a substantial reason for requiring that an out-of-state attorney, who once held a plenary license to practice law in New Jersey, pay 17 years of arrearages in order to be admitted *pro hac vice* when such a financial burden is not placed upon all other out-of-state attorneys?

4. Does New Jersey law requiring Mr. Smith, a Massachusetts attorney, to pay arrearages to the New Jersey Lawyers' Fund for Client Protection for the 17 years when he had not practiced in New Jersey, constitute a direct burden upon interstate commerce in violation of the Commerce Clause of the United States Constitution?

QUESTIONS PRESENTED FOR REVIEW – Continued

5. Where there is no legitimate relationship between New Jersey's requirement that a Massachusetts attorney, who has not practiced in New Jersey for more than 17 years, pay 17 years of arrearages to the Lawyers' Fund for Client Protection and New Jersey's articulated justification for the requirement, which is to protect New Jersey clients from their dishonest attorneys, does such a law violate the Commerce Clause of the United States Constitution?

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OPINIONS BELOW

The opinion of the Supreme Court of New Jersey filed on May 7, 2003 is published at 176 N.J. 141 and 820 A.2d 1230, and is also included in the Appendix at App. 1. The order of the Superior Court of New Jersey, Law Division granting admission *pro hac vice*, filed June 21, 2002, is unpublished and is reproduced in the Appendix at App. 9.

STATEMENT OF BASIS FOR JURISDICTION

Petitioner, Boston University, on its own behalf, and on behalf of its Associate General Counsel, Robert B. Smith, Esq., seeks review of the May 7, 2003 decision of the Supreme Court of New Jersey in *Boston University v. University of Medicine and Dentistry of New Jersey*, 176 N.J. 141, 820 A.2d 1230 (2003).

This Court has jurisdiction pursuant to 28 U.S.C. § 1257 to review final judgments rendered by the highest court of a state where a statute of that state is "repugnant to the Constitution . . . or where any title, right, privilege, or immunity" is claimed under the Constitution. While the opinion of the New Jersey Supreme Court is silent as to the constitutional grounds, the issues were unquestionably raised before that court and "the state court had 'a fair opportunity to address the federal question that is sought to be presented here.'" *Adams v. Robertson*, 520 U.S. 83, 87 (1997). Instead of addressing the federal constitutional issues squarely presented to it, the New Jersey Supreme Court ignored all such issues and announced a "new" interpretation of New Jersey law that violates both the fair notice requirements of the Due Process Clause, as well

as the Privileges and Immunities, Equal Protection and Commerce Clauses of the Constitution. This petition seeks review of the New Jersey Supreme Court's May 7, 2003 decision revoking an out-of-state attorney's right to appear *pro hac vice* in violation of the United States Constitution.

Although the underlying action remains ongoing, this Court may grant review "where the federal claim has been finally decided, with further proceedings of the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 481 (1975). In this matter, further review of the federal constitutional questions cannot take place, except by this Court.

CONSTITUTIONAL PROVISIONS AND APPLICABLE RULES

The following provisions of the United States Constitution and New Jersey Court Rules are relied upon by Petitioner, Boston University:

(1) **U.S. Const. art. I, § 8, cl. 3.** "The Congress shall have Power To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

(2) **U.S. Const. art. IV, § 2, cl. 1.** "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

(3) U.S. Const. amend. XIV, § 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(4) N.J. Ct. R. 1:21-2, Appearances Pro Hac Vice. "(a) Conditions for Appearance. An attorney of any other jurisdiction, of good standing there, whether practicing law in such other jurisdiction as an individual or a member or employee of a partnership or an employee of a professional corporation or limited liability entity authorized to practice law in such other jurisdiction, or an attorney admitted in this state, of good standing, who does not maintain in this state a bona fide office for the practice of law may, at the discretion of the court in which any matter is pending, be permitted, *pro hac vice*, to speak in such matter in the same manner as an attorney of this state who maintains a bona fide office for the practice of law in this state and who is therefore, pursuant to R. 1:21-1(a), authorized to practice in this state. No attorney shall be admitted under this rule without annually complying with R. 1:20-1(b), R. 1:28-2, and R. 1:28B-1(e) during the period of admission. An application for admission pro hac vice shall be made on motion to all parties in the matter."

(5) N.J. Ct. R. 1:28-1, New Jersey Lawyers' Fund For Client Protection: Purpose; Administration; Appointments. "(a) Administration. The Supreme Court shall appoint seven trustees to administer and operate, in accordance with these rules, the New Jersey Lawyers'

Fund for Client Protection, whose purpose is the reimbursement, to the extent and in the manner provided by these rules, of losses caused by the dishonest conduct of members of the bar of this State."

(6) N.J. Ct. R. 1:28-2, New Jersey Lawyers' Fund For Client Protection, Payment to the Fund; Enforcement. "(a) Generally. Except as hereinafter provided, each holder of a plenary license to practice law in the State of New Jersey shall pay annually to the treasurer of the Fund a sum that shall be determined each year by the Supreme Court. An attorney who makes payment after February 1 of the billing year, or such other date as the Court may determine, but before being placed on the Ineligible List shall be subject to a late fee of $25, which shall be shared equally with the Ethics Financial Committee. The treasurer shall annually report the names of all attorneys failing to comply with the provisions of this Rule to the Supreme Court for inclusion on the list of those attorneys deemed ineligible to practice law in New Jersey by order of the Court. An attorney shall be reinstated automatically to the practice of law without further order of the Court on filing with the Fund the annual registration statement for the current year together with the annual payment, the late fee, any arrears due from prior years, and a reinstatement fee of $25 if the attorney's name is being removed from one calendar year's Ineligible List or $50 if the attorney's name is being removed from two or more calendar years' Lists."

STATEMENT OF CASE

Robert B. Smith, Esq. was admitted to practice law in New Jersey in 1978. (App. 2) Mr. Smith practiced in New Jersey for approximately three years, before leaving New Jersey to practice law full-time in New York. (*Id.*) In 1986, Mr. Smith moved to Massachusetts, where he has lived, been employed, and practiced law continuously for the past 17 years. (*Id.*) When Mr. Smith left the New York/New Jersey area he never intended to return or to resume the full-time practice of law in New Jersey. Since 1986, Mr. Smith has not paid any of the annual assessments to the New Jersey Lawyers' Fund for Client Protection ("Fund") required in order to maintain his "eligibility" to practice law in New Jersey under his New Jersey license.[1] (*Id.*) Since moving to Massachusetts, Mr. Smith has not attempted to utilize his New Jersey license to practice law, but instead sought and was granted admission to, and has consistently maintained his status

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[1] The Fund is governed by New Jersey Court Rule 1:28. *et seq.* Under N.J. Ct. R. 1:28-2(a), "each holder of a plenary license to practice law in the State of New Jersey shall pay annually to the treasurer of the Fund a sum that shall be determined each year by the [New Jersey] Supreme Court." The Rule also provides that "the treasurer shall annually report the names of all attorneys failing to comply with the provisions of this Rule to the Supreme Court for inclusion on the list of those attorneys deemed ineligible to practice law in New Jersey by order of the Court." The Fund considers for payment those claims "resulting from the dishonest conduct of a member of the bar of the state or an attorney or fiduciary." N.J. Ct. R. 1:28-3(a). For a claim to be considered, the dishonest conduct must have been "engaged in while the attorney was a practicing member of the Bar of this State or admitted *pro hac vice* in a matter pending in this State." N.J. Ct. R. 1:28-3(a)(1). The Fund is not a party in the pending action before the New Jersey trial court.

as an attorney "in good standing" before, the highest court of the Commonwealth of Massachusetts. (App. 9) To this day, Mr. Smith continues to hold that status before the highest court of Massachusetts. (App. 88) Finally, throughout his entire career as an attorney, Mr. Smith has never been cited for any professional infraction whatsoever by the bars of any of the states in which he has either been licensed or permitted to practice law. (App. 89)

Boston University ("BU") is a non-profit Massachusetts corporation and an institution of higher learning. In 1991, Mr. Smith was appointed by the Trustees of BU to the position of Associate General Counsel for the University, and has represented BU in many complex litigation matters. (*Id.*)

In April 1999, BU entered into an agreement with the University of Medicine and Dentistry of New Jersey ("UMDNJ") to conduct a joint research project. (App. 30) After working together for approximately two years, UMDNJ discontinued payment for certain services, as called for by the agreement between the two schools. During the summer of 2001, efforts were made by BU, through its Office of the General Counsel, to informally resolve the dispute. These efforts failed, and legal action became necessary. In 2001, BU retained counsel admitted to practice law in New Jersey, and filed a complaint in the Superior Court of New Jersey to recover damages from UMDNJ for breach of the 1999 research agreement. UMDNJ is a New Jersey state institution, and is represented in this matter by the Attorney General of the State of New Jersey.

In the spring of 2002, in an effort to stem the growing legal fees, BU requested that Mr. Smith become more

actively involved in the handling of the litigation. (App. 89, 96) In June 2002, BU petitioned the trial court for an order admitting Mr. Smith *pro hac vice* pursuant to N.J. Ct. R. 1:21-2(a). (App. 88-90)

BU relied upon the plain language of N.J. Ct. R. 1:21-2(a), which states:

> An attorney of any other jurisdiction, of good standing there . . . or an attorney admitted in this state, of good standing, who does not maintain a bona fide office for the practice of law may, at the discretion of the court in which any matter is pending, be permitted, *pro hac vice,* to speak in such matter in the same manner as an attorney of this state who maintains a bona fide office for the practice of law in this state and who is therefore, pursuant to R. 1:21-1(a), authorized to practice in this state.

In its *pro hac vice* application, BU relied upon the undisputed fact that Mr. Smith was in good standing in Massachusetts. (App. 88-90) UMDNJ opposed BU's application, arguing that Mr. Smith was ineligible to be admitted *pro hac vice* because he was listed as an attorney holding a New Jersey license, who had not paid his annual assessments to the Fund since leaving the New York/New Jersey area in 1986. (App. 92) UMDNJ asserted that Mr. Smith could only be admitted *pro hac vice* if he paid all arrearages since 1986, even though Mr. Smith sought permission to appear in a single matter on behalf of his employer, BU, on the basis of his status as an attorney in good standing in the Commonwealth of Massachusetts and not under his inactive New Jersey license. (App. 16)

After fully reviewing and considering the objections of UMDNJ, the trial court (the Honorable Stephen J. Bernstein,

J.S.C., presiding), by order dated June 21, 2002, admitted Mr. Smith *pro hac vice*. (App. 9-11) The trial court's ruling was based upon the plain language of N.J. Ct. R. 1:21-2(a), which allows "an attorney of any other jurisdiction of good standing there" to be admitted *pro hac vice*, and termed the arrearage argument a "non-issue." (App. 14) In making its decision, the trial court relied upon Mr. Smith's status as an attorney in good standing before the highest court of Massachusetts, the fact that Mr. Smith had been Associate General Counsel for BU for over 11 years, and the fact that BU had requested that Mr. Smith represent it in this litigation in order to reduce its legal fees. (App. 19-20)

Thereafter, UMDNJ moved for reconsideration, relying upon the newly filed certifications of Stephen Townsend, the Clerk of the New Jersey Supreme Court, and Kenneth Bossong, the Director and Counsel to the Fund. Mr. Townsend certified that an attorney licensed in New Jersey is not entitled to receive a Certificate of Good Standing until the attorney pays all outstanding amounts owed to the Fund. (App. 98-100) Mr. Bossong certified that a New Jersey attorney is "ineligible" to practice if the attorney has failed to pay the annual assessment to the Fund. (App. 102-03) Significantly, these certifications were the only authority relied upon by New Jersey to support the proposition that Mr. Smith should not be admitted *pro hac vice* as a Massachusetts attorney in good standing, no rule or other law was cited. Notwithstanding these newly submitted certifications, the trial court denied UMDNJ's motion for reconsideration. (App. 22-23)

Pursuant to the trial court's order, Mr. Smith tendered payment of $170 to the Fund for the current year's fees, which was in full compliance with all financial obligations required under N.J. Ct. R. 1:21-2(a), which states: "No

attorney shall be admitted under this [*pro hac vice*] rule without annually complying with N.J. Ct. R. 1:20-1(b) [payment to the Oversight Committee], N.J. Ct. R. 1:28-2 [payment to the Fund], and N.J. Ct. R. 1:28B-1(e) [payment to the New Jersey Lawyers Assistance Program] *during the period of admission*." (emphasis added).

Shortly after Mr. Smith remitted payment to the Fund, and notwithstanding the order of the trial court admitting Mr. Smith *pro hac vice*, Mr. Smith received a notice from the Fund (which had already submitted a certification in opposition to BU's motion) that his $170 payment was insufficient because he did not include payment of arrearages for the years when he practiced law outside of New Jersey. (App. 32) According to the Fund, which was not a party, because of Mr. Smith's failure to pay such arrearages, he was ineligible to practice in New Jersey, and would remain ineligible until all arrearages were paid in full. (*Id.*)

By letter dated August 13, 2002, Mr. Smith requested the trial court's intervention so that he could participate fully in the litigation and move the case forward. In response to Mr. Smith's request, the trial court, after communicating with "the Fund," confirmed with Mr. Smith the Fund's refusal to accept the $170 payment. (*Id.*) According to the trial court, despite the fact that Mr. Smith was an attorney in good standing in Massachusetts and had not practiced in New Jersey since 1986, the Fund viewed Mr. Smith as a New Jersey attorney for the purposes of being admitted *pro hac vice*. (App. 33) According to the Fund, Mr. Smith could "avoid repayment of all these

arrearages by submission of a letter of resignation from the New Jersey Bar at which time the arrearages would be vacated. . . . " (*Id.*)[2] Subsequent to the Fund's refusal to accept Mr. Smith's remittance and its refusal to respect and comply with the trial court's prior order of admission *pro hac vice*, the matter went into a virtual suspension before the trial court, which neither vacated its prior order of admission nor entered any further orders enforcing the terms of its prior order. (*Id.*)

This stalemate was resolved shortly thereafter when, on September 18, 2002, the Appellate Division of the Superior Court of New Jersey granted UMDNJ's motion for leave to appeal, and the trial court stayed all proceedings. (*Id.*) Then, before any further substantive proceedings had occurred before the Appellate Division, the Supreme Court of New Jersey, implementing a rarely used procedure, on its own motion, directly certified UMDNJ's appeal and moved the matter from the Appellate Division to its own docket for substantive consideration. (App. 3)

BU presented the New Jersey Supreme Court with several reasons to uphold the trial court's order admitting Mr. Smith *pro hac vice*. First, BU addressed the plain language of New Jersey's *pro hac vice* rule and Mr. Smith's

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[2] Significantly, the State, on behalf of UMDNJ, went further than the Fund in its position – it claimed that even if Mr. Smith had accepted the ultimatum proffered by the Fund and submitted his letter of resignation, the State would have continued to oppose Mr. Smith's *pro hac vice* admission, based on its interpretation of the resignation rule, which allows an attorney in good standing to resign without prejudice. N.J. Ct. R. 1:20-22(a). UMDNJ claims this rule requires an attorney to pay *ALL* arrearages before that attorney may resign from the practice of law.

full compliance with the explicit language of that rule. (App. 36-49) Pursuant to N.J. Ct. R. 1:21-2(a), Mr. Smith's current status as an attorney in good standing in the Commonwealth of Massachusetts was alone sufficient for him to be admitted *pro hac vice*. Second, BU raised four separate and distinct issues of federal constitutional law. BU established that the United States Constitution limits the burdens states may impose upon the privileges and immunities of out-of-state residents and that the rule, as interpreted by UMDNJ, arbitrarily discriminated against Mr. Smith, an out-of-state attorney in good standing in Massachusetts. (App. 54-59) BU also argued that the unique burden imposed upon Mr. Smith violated the Equal Protection Clause. (App. 60-63) BU raised due process concerns arguing that states may not apply their laws without fair notice or in an arbitrary and capricious manner. (App. 63-65) BU argued that if the New Jersey Supreme Court ruled in a manner inconsistent with the plain language of the rule – requiring a Massachusetts attorney in good standing who had left New Jersey to pay 17 years of arrearages to the Fund in order to have his out-of-state license to practice recognized, and to represent his out-of-state client in New Jersey – then pursuant to the protections of the Due Process Clause such a ruling should only be applied prospectively so as not to deprive Mr. Smith of fair notice of the law. Finally, BU argued that the law, as interpreted by the UMDNJ, constituted an impermissible burden on interstate commerce. (App. 65-67)

On May 7, 2003, the New Jersey Supreme Court reversed the trial court, concluding that Mr. Smith was ineligible for *pro hac vice* admission in New Jersey unless and until he paid all of the arrearages to the Fund. *Boston*

Univ., 176 N.J. at 148, 820 A.2d at 1233. (App. 8) None of the Constitutional issues raised by BU were either referenced or addressed in the New Jersey Supreme Court's opinion. Instead, the New Jersey Supreme Court focused exclusively upon the fact that Mr. Smith had obtained a license to practice law in New Jersey in 1978, and was thus, subject to the same financial burdens as all other attorneys currently practicing law in New Jersey.

The court declared that "Smith has elected to maintain his license to practice law in New Jersey, thereby preserving his right to seek immediate reinstatement as an attorney in good standing." *Id.* at 146, 820 A.2d at 1233. (App. 6) Initially, it must be noted that there is nothing in the record to suggest that Mr. Smith "elected to maintain his license." The record facts are not in dispute. Mr. Smith left the New York/New Jersey area to live, work, and practice law in another state. Once he left, Mr. Smith did not pay the annual assessments to the Fund. Mr. Smith did not resign or surrender his New Jersey license at the time that he left the New York/New Jersey area, nor was he aware that should he ever seek to appear in a New Jersey court *pro hac vice* as an attorney in good standing of the bar of another state, that he would be denied admission because he had not paid annual assessments to the Fund during those years when he was neither practicing law in New Jersey, nor practicing law pursuant to his New Jersey license.[3] Mr. Smith's application

[3] In fact, UMDNJ has argued that Mr. Smith *cannot* resign at this point without paying this tax upon his license. Under N.J. Ct. R. 1:20-22(a), an attorney must be "in good standing" before the attorney may resign. Stephen Townsend, the Clerk of the New Jersey Supreme Court, has stated that he will not issue a Certificate of Good Standing to an

(Continued on following page)

for admission *pro hac vice* did not seek reinstatement of his plenary license to practice under his New Jersey license, nor was his application an attempt to exercise in any way any privilege or right he may have had under his prior, but unexercised New Jersey license.

The New Jersey Supreme Court started its analysis by noting that under the New Jersey Constitution, it is vested with plenary authority to regulate the practice of law in the State and, pursuant to that authority, the court had promulgated rules that require all New Jersey attorneys to pay an annual assessment to the Fund. *Id.* at 144, 820 A.2d at 1231-32. (App. 4) These payments are used to support a state-wide attorney-discipline and fee-arbitration systems, and to reimburse clients who have incurred financial losses because of dishonest conduct by attorneys actively practicing in New Jersey. *Id.* The New Jersey Supreme Court relied upon the fact that under N.J. Ct. R. 1:20-1(b)-(c) and 1:28-2, it annually issues an order declaring that each attorney whose name appears on the "ineligible" list may not practice law in New Jersey until he or she pays any outstanding amounts due to the Fund. *Id.* at 145, 820 A.2d at 1232. (App. 4)

It was upon those rules governing attorney assessments, and not the *pro hac vice* rule, where the court found support for its "new" interpretation and conclusion

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attorney who is on the Ineligible List for failure to pay into the Fund. (App. 99) Although no rule or other authority is cited for his decision, the New Jersey Supreme Court held that Mr. Smith is not "in good standing" due to his failure to pay the administrative tax upon his license. Consequently, Mr. Smith cannot resign his New Jersey license without paying the tax.

that Mr. Smith was ineligible to practice *pro hac vice* – even as an out-of-state attorney in good standing of another state. Although the New Jersey Supreme Court determined that Mr. Smith was not in "good standing," this determination was not based upon any disciplinary infraction or mar upon his professional character or reputation – in either New Jersey or Massachusetts. *Id.* at 148, 820 A.2d at 1234. (App. 8) Under the New Jersey Supreme Court's "new" analysis, however, as long as Mr. Smith simply continued to be listed as a licensed New Jersey attorney, albeit ineligible to exercise any rights or privileges under his New Jersey license, and even though he did not seek to reinstate his New Jersey license, he had continuing financial obligations to the Fund that he could not "shirk." Until Mr. Smith paid all past sums to the Fund, his "good standing" before the highest court of the Commonwealth of Massachusetts would not be recognized by New Jersey. *Id.*

In effect, the New Jersey Supreme Court concluded under its new interpretation that despite Mr. Smith's unquestioned "good standing" as an attorney of Massachusetts, his ability to rely upon that standing was solely contingent upon his payment of past sums to the New Jersey Fund – in essence a special "status" tax that bears no rational relationship to the unique burden imposed on him, but not upon other out-of-state attorneys of "good standing" seeking *pro hac vice* admission in New Jersey. Prior to its decision concerning Mr. Smith's application, the New Jersey Supreme Court had not previously addressed this issue, nor had it provided any non-judicial guidance that would have alerted or foretold of its interpretation of the rules upon which it relied.

Indeed, while the court had no hesitancy in revoking Mr. Smith's *pro hac vice* status, it expressed its own determination that the applicable court rule, N.J. Ct. R. 1:21-2(a), needed "appropriate clarification." To prevent future confusion regarding the proper interpretation of the rule, the court referred the rule to its Civil Practice Committee "for appropriate clarification consistent with this opinion." *Id.* Nonetheless, and contrary to its own precedents and Constitutional notions of fair notice, the New Jersey Supreme Court applied its holding retroactively to Mr. Smith and directed the trial court to revoke his *pro hac vice* admission. This was a blatant denial of Mr. Smith's Due Process and Constitutional rights. By order dated July 11, 2003, the Superior Court revoked Mr. Smith's *pro hac vice* admission in accordance with the New Jersey Supreme Court's opinion. (App. 24-25)

REASONS FOR GRANTING THE PETITION

A. IN THE INTEREST OF DUE PROCESS, ANY DECISION THAT SEEKS TO CLARIFY THE RULES AND THAT ADVERSELY IMPACTS ROBERT SMITH'S RIGHTS SHOULD ONLY BE APPLIED PROSPECTIVELY.

The New Jersey Supreme Court's decision directly violates a fundamental concept embodied in our Constitution – Due Process of law. Procedural Due Process requires that the laws affecting the rights of citizens be clear in their purpose and application. U.S. Const. amend. XIV, § 1. Among the rights entitled to the procedural safeguards of Due Process is an attorney's law license. *Casella v. Pennsylvania Interest on Lawyers Trust Account Bd.*, 47 Fed. Appx. 193, 195 (3d Cir. 2002). Because the New

Jersey Supreme Court held that "Rule 1:21-2 [be referred] to the Civil Practice Committee for appropriate clarification," *Boston Univ.*, 176 N.J. at 148, 820 A.2d at 1234 (App. 8), the natural analog is that the rule is ambiguous. The New Jersey Supreme Court's retroactive clarification violates Mr. Smith's right to Due Process by burdening Mr. Smith's law license.

The *pro hac vice* rule provides, in relevant part:

> *An attorney of any other jurisdiction, of good standing there . . . or an attorney admitted in this state*, of good standing, who does not maintain a bona fide office for the practice of law may, at the discretion of the court in which any matter is pending, be permitted, *pro hac vice,* to speak in such matter in the same manner as an attorney of this state who maintains a bona fide office for the practice of law in this state and who is therefore, pursuant to R. 1:21-1(a), authorized to practice in this state.

N.J. Ct. R. 1:21-2(a) (emphasis added). On its face, the rule appears to import an "either/or" standard for the requirements needed to qualify for *pro hac vice* admission. Given the inclusion of a disjunctive "or" by the drafters of the rule, the trial court concluded that Mr. Smith had satisfied the requirements for *pro hac vice* admission on the basis of his good standing before the bar of Massachusetts, the jurisdiction where he resides and solely practices.

While the New Jersey Supreme Court admitted that the *pro hac vice* rule was poorly drafted and required clarification, it nevertheless applied a "new" interpretation of the rule retroactively to Mr. Smith in violation of Due Process and its own holdings. Laws that are vague or

without standards violate Due Process. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). In its decision, the New Jersey Supreme Court, for the first time, announced this "new" interpretation, requiring all New Jersey licensees, regardless of their standing in the state where they primarily and solely practice law, to be in good standing in New Jersey. *Boston Univ.*, 176 N.J. at 146, 820 A.2d at 1232-33. (App. 5-6) This requirement, as pronounced by the New Jersey Supreme Court, is not set forth in the plain language of N.J. Ct. R. 1:21-2 or the comments that follow. Recognizing the rule's ambiguity, the court referred the rule to a committee for clarification in light of their new interpretation. *Id.* at 148, 820 A.2d at 1234. (App. 8) Nonetheless, the court's ruling requires Mr. Smith to pay 17 years of arrearages to the Fund even though he completely moved his law practice to Massachusetts and has not since returned to represent clients in New Jersey. The new interpretation of N.J. Ct. R. 1:21-2 invalidates Mr. Smith's Massachusetts license, by insisting that Mr. Smith pay the tax on his old New Jersey license before his *pro hac vice* admission will be granted.

The retroactive modification of the New Jersey rule, which requires Mr. Smith to pay the tax upon his New Jersey license and forfeit reliance upon his good standing in Massachusetts until he does so, violates Due Process. Citizens must have fair notice of how laws affecting their rights will be applied. *Morales*, 527 U.S. at 58; *Smith v. Goguen*, 415 U.S. 566, 572 (1974). Without fair notice, a rule cannot be enforced to limit Mr. Smith's rights and interests. *See Morales*, 527 U.S. at 58 (Due Process requires fair notice of the application of law). Under the rubric of this constitutional guidance, New Jersey courts

apply decisions prospectively whenever a decision decides an issue of first impression or clarifies a vague law. N.J. Ct. R. 1:36-3, cmt.; *Montells v. Haynes*, 133 N.J. 282, 295, 627 A.2d 654, 660 (1993). New Jersey courts will also apply decisions prospectively when fairness and equity require. *Montells*, 133 N.J. at 297, 627 A.2d at 662; *Coons v. American Honda Motor Co., Inc.*, 96 N.J. 419, 430, 476 A.2d 763, 770 (1984). Once the New Jersey Supreme Court declared a new interpretation of the rule governing *pro hac vice* admission, the decision could only have been applied prospectively. Such a ruling would have preserved Mr. Smith's Due Process rights. Instead, the New Jersey Supreme Court disregarded its own precedent regarding prospective application and the tenets of Due Process by retroactively applying its holding to Mr. Smith.

B. THE PRIVILEGES AND IMMUNITIES CLAUSE IS VIOLATED BY REQUIRING ROBERT SMITH, A MASSACHUSETTS ATTORNEY, TO PAY A TAX TO THE STATE OF NEW JERSEY FOR WHICH THERE IS NO SUBSTANTIAL REASON NOR A SUBSTANTIAL RELATIONSHIP BETWEEN THE BURDEN AND THE PURPORTED OBJECTIVE OF THE FUND.

The New Jersey Supreme Court's new interpretation of the *pro hac vice* rule violates the Privileges and Immunities Clause of the United States Constitution. Mr. Smith is in good standing before the highest court of the Commonwealth of Massachusetts, the state in which he resides and engages in the practice of law. And yet, on the basis of a license obtained 25 years ago but not exercised in 17 years, Mr. Smith has been denied the right to practice law

pro hac vice in New Jersey. To regain the right afforded to all other out-of-state attorneys, the New Jersey Supreme Court demands that Mr. Smith pay the tax upon his unused New Jersey license. *Boston Univ.*, 176 N.J. at 148, 820 A.2d 1234. (App. 8) This demand leaves Mr. Smith with no choice: either pay the tax for the 17 years that he has not practiced in New Jersey, or forfeit any opportunities for *pro hac vice* admission. He cannot even resign his license, because to do so he must be in "good standing," i.e. he must pay the tax in full. But, the State has not proffered a substantial reason for denying Mr. Smith the use of his Massachusetts license, nor demonstrated a substantial relationship between the burden imposed upon Mr. Smith and the objective sought in this new interpretation. *See* U.S. Const. art. IV, § 2, cl. 1; *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985); *see also Tolchin v. Supreme Court of New Jersey*, 111 F.3d 1099, 1111 (3d Cir. 1997).

This Court has recognized the right to practice law is a privilege protected by the Privileges and Immunities Clause. *Piper*, 470 U.S at 283. Throughout his career, Mr. Smith, like many attorneys, has obtained licenses to practice law in different states. In this case, Mr. Smith resided and practiced in New Jersey for three years before ultimately moving to Massachusetts in 1986. However, because he was once admitted to practice in New Jersey and did not resign or revoke his New Jersey license, the New Jersey Supreme Court ignored Mr. Smith's constitutionally protected privilege to practice under his Massachusetts license. Such a broad restriction upon Mr. Smith's rights must be carefully scrutinized under the heightened scrutiny of the Privileges and Immunities Clause.

To deprive Mr. Smith of his right to practice law, unless he pays the requisite tax, New Jersey must have a substantial reason to impose such a burden. Although the opinion of the New Jersey Supreme Court does not provide a substantial reason for the tax upon Mr. Smith's license, a reason is proffered by that Court's rules. The *pro hac vice* rule states that the objective of the Fund is to reimburse clients for "losses caused by the dishonest conduct" of their New Jersey attorneys. N.J. Ct. R. 1:28-1(a); *see also* N.J. Ct. R. 1:28-3(a). This salutary goal is the extent of the Fund's stated objective, and however legitimate and well-intentioned this goal may be, it does not satisfy the "substantial reason" test. There must be a substantial reason for taxing an out-of-state resident, who does not practice in New Jersey, and invalidating his ability to rely upon his Massachusetts law license. There is no such substantial reason here.

This Court has scrutinized states' reasons burdening law licenses under the Privileges and Immunities Clause, and a review of these decisions aptly demonstrates New Jersey's failure to provide a substantial reason. In *Piper*, the State of New Hampshire asserted a substantial interest in an attorney's familiarity with the state rules and procedures, attorneys' ethical behavior, and the availability of attorneys to attend court proceedings and perform *pro bono* or volunteer work in the state. 470 U.S. at 285. While each objective had merit, this Court concluded that under the Privileges and Immunities Clause, "none of these reasons meets the test of 'substantiality,' and that the means chosen do not bear the necessary relationship to the State's objectives." *Id.* Then, in *Barnard v. Thorstenn*, 489 U.S. 546, 553 (1989), this Court held that the reasons offered by the Virgin Islands in requiring bar

applicants to be residents – including that delays in the publication of laws will prevent nonresidents from maintaining an adequate level of competency, the burden upon court schedules in accommodating nonresidents, and the inability to adequately supervise a nationwide bar membership – did not meet the substantiality test. None of these reasons rose to the level of a substantial objective or bore a substantial relationship to that objective. *Id.* at 553-54.

Similarly, the new interpretation of the *pro hac vice* rule, that nonresidents (but formerly New Jersey attorneys) who do not practice in the State must continue to pay the tax imposed by the Fund to protect New Jersey clients of attorneys practicing in New Jersey, fails to satisfy constitutional scrutiny. The Fund is a revenue-raising mechanism that falls far short of the "substantial reason" test.[4] *See Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (administrative convenience does not pass constitutional muster under heightened scrutiny); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (administrative efficiency will not withstand scrutiny of a law impinging on the right to travel). Although a substantial reason may support taxing attorneys who actively practice in New Jersey, as they are part of the overall system of justice in the State, this same reason does not support taxing attorneys who do not represent New Jersey clients in New Jersey courts.

Additionally, while the goal of the Fund is to reimburse clients harmed by miscreant attorneys, the Fund,

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[4] If the objective of the Fund is purely economic, then the collection of arrearages is unnecessary given the current surplus. Robert G. Seidenstein, *Client Protection Fund: Here lies the nation's fattest surplus*, N.J. Lawyer, Dec. 9, 2002, at 1.

itself, does not promote ethical behavior. New Jersey courts recognize that failure to pay into the Fund "has no connection with the lawyer's character, intellectual acuity, or dedication to the client's interest." *New Jersey v. Green*, 274 N.J. Super. 15, 26, 643 A.2d 18, 23 (App. Div. 1994). In fact, the New Jersey Supreme Court stated that if Mr. Smith paid the tax, he would automatically return to good standing. *Boston Univ.*, 176 N.J. at 148, 820 A.2d at 1234. (App. 8) It is apparent, therefore, that this tax upon Mr. Smith's law license serves only as a revenue-raising mechanism – a goal that fails to meet the substantial reason test of the Privileges and Immunities Clause.

Furthermore, there is no substantial relationship between the burden imposed upon Mr. Smith and the purported goal of the Fund. Mr. Smith is an attorney in good standing in Massachusetts. He neither resides nor practices law in New Jersey, nor has he done so for the past 17 years. If Mr. Smith practiced law in New Jersey, then he would be required to make the requisite payments into the Fund as part of his participation in an overall scheme designed to protect clients from dishonest New Jersey attorneys. N.J. Ct. R. 1:28-2(a). But, these are not the facts of this case and there is no relationship between the tax imposed and the goal of the Fund.

Mr. Smith is not a New Jersey attorney. He is an out-of-state attorney from Massachusetts who resides and practices law in that state where he maintains his status in "good standing." The decision by the New Jersey Supreme Court impinges upon Mr. Smith's Massachusetts license by denying him *pro hac vice* admission unless he pays into a Fund from which his clients cannot collect. Prior to 1992, "the fund would not reimburse *any* victims of out-of-state lawyers." *Abdallah v. Pileggi*, 914 F. Supp.

1115, 1120 (D.N.J. 1996) (emphasis added). Since then, the Fund has permitted limited reimbursement of claims resulting from dishonest conduct "while the attorney was a *practicing* member of the Bar of this State or *admitted Pro Hac Vice* in a matter pending in this State." N.J. Ct. R. 1:28-3(a)(1) (emphasis added). Thus, under these reimbursement guidelines, none of Mr. Smith's clients are eligible for reimbursement, because from 1981 to 1992 the Fund would not reimburse any victims of out-of-state attorneys, and since 1992 the Fund only reimbursed victims of attorneys practicing in New Jersey or those admitted *pro hac vice*. *Abdallah*, 914 F. Supp. at 1120; N.J. Ct. R. 1:28-3(a)(1). Since Mr. Smith has not practiced law in New Jersey in any manner since 1981, none of his clients could be reimbursed even while his license was taxed by the Fund. Consequently, there is no relationship between the tax imposed by New Jersey upon Mr. Smith's law license and the purported purpose of the Fund.

C. TREATING ROBERT SMITH DIFFERENTLY FROM OTHER OUT-OF-STATE ATTORNEYS SEEKING TO BE ADMITTED *PRO HAC VICE* VIOLATES EQUAL PROTECTION BECAUSE IT BURDENS HIS RIGHT TO INTERSTATE MIGRATION WITHOUT A SUBSTANTIAL REASON OR A SUBSTANTIAL RELATIONSHIP BETWEEN THAT REASON AND THE IMPOSED BURDEN.

The New Jersey Supreme Court's application of the *pro hac vice* rule to Mr. Smith violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. By this holding, Mr. Smith is penalized for having once practiced in New Jersey and treated

differently from other out-of-state attorneys who never practiced in New Jersey. The Equal Protection Clause is violated by laws that on their face or by application differentiate between individuals who are otherwise similarly situated. U.S. Const. amend. XIV, § 1; *see Tolchin*, 111 F.3d at 1113. Review of the offending law is conducted under heightened scrutiny when the classification created intrudes upon the fundamental right to travel and migrate between the states. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 904 (1986). Under heightened scrutiny, the offending law will only survive if the state can show that the "classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *United States v. Virginia*, 518 U.S. 515, 533 (1996). The state's "proffered justification" must be "exceedingly persuasive" to survive such scrutiny. *Id.* New Jersey's taxation of Mr. Smith's law license cannot withstand this scrutiny.

Distinguishing Mr. Smith from other out-of-state attorneys on the basis of his former practice in New Jersey implicates the fundamental right to travel. This right is affected whenever a state creates a classification that penalizes the exercise of that right. *Soto-Lopez*, 476 U.S. at 903; *see also Shapiro*, 394 U.S. at 634. A classification that impinges upon this right "warrant[s] careful judicial review." *Soto-Lopez*, 476 U.S. at 905. Careful review of the New Jersey Supreme Court's interpretation of the *pro hac vice* rule to Mr. Smith demonstrates that this interpretation violates the Equal Protection Clause and the fundamental right to travel.

On its face, N.J. Ct. R. 1:21-2(a) treats all out-of-state attorneys equally – it requires all out-of-state attorneys

admitted *pro hac vice* to pay into the Fund when they are admitted *pro hac vice*. Consequently, out-of-state attorneys who regularly practice before New Jersey courts will remit payments to the Fund annually. This requirement is consistent with the State's objective of reimbursing clients for the dishonest conduct of lawyers who are actually practicing within the State. However, the New Jersey Supreme Court's interpretation of N.J. Ct. R. 1:21-2 creates a new sub-class of out-of-state attorneys, including Mr. Smith, who are required to shoulder an additional, unique burden. This sub-class separates out-of-state attorneys who once practiced in New Jersey from all other out-of-state attorneys by requiring the former to pay this tax into the Fund throughout the duration of their careers even after they left New Jersey to practice on a full-time basis elsewhere. There is no "exceedingly persuasive" justification underlying the creation of this sub-class – which is not recognized by the rule – because out-of-state attorneys who do not practice before New Jersey courts and their clients cannot seek reparation through the Fund. *See Virginia*, 518 U.S. at 533 (under heightened scrutiny, the state's justification must be "exceedingly persuasive"). There is simply no important government objective underlying the different treatment of out-of-state attorneys who, although once practicing in New Jersey, are not currently practicing there.

Under analogous facts, this Court struck down state-created preferences burdening interstate migration. *Williams v. Vermont*, 472 U.S. 14 (1985). In *Williams*, the plaintiff, a recent migrant from Illinois, appealed the $172 use tax imposed upon the vehicle he purchased in Illinois. If the plaintiff had resided in Vermont at the time of the purchase, then he would have been exempt from the tax. But, because he migrated to Vermont three months after

the purchase, he was subject to the tax. This Court recognized that "to provide a credit only to those who were residents at the time they paid the sales tax to another State is an arbitrary distinction that violates the Equal Protection Clause." *Id.* at 22. The statute was invalid under the Equal Protection Clause: "Imposing a use tax on [new residents] in no way protects local business." *Id.* at 25. Likewise, there is no important government reason for taxing Mr. Smith while he practiced law out-of-state – the tax does not protect any of Mr. Smith's clients, including BU.

Even if this Court finds an important reason for taxing Mr. Smith, the proffered reason must be substantially related to the State's goal of protecting parties from dishonest attorneys. *See Virginia*, 518 U.S. at 533; N.J. Ct. R. 1:28-1. Requiring that Mr. Smith pay the Fund for the 17 years when he did not practice in New Jersey is completely unrelated to Mr. Smith's honesty or the protection of Mr. Smith's clients during those years and, therefore, has no relationship to the stated objective of the Fund. N.J. Ct. R. 1:28-1. Additionally, BU, Mr. Smith's only client for the past 11 years, could not collect from the Fund for any dishonesty by Mr. Smith because Mr. Smith has not represented BU, or anyone else, before New Jersey courts for 17 years.

Finally, the State's new interpretation of the rule fails even a basic rationality test. "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Laws that cannot meet this minimum rationality requirement are constitutionally infirm." *Schumacher v. Nix*, 965 F.2d 1268, 1269 (3d. Cir. 1992); *see also Tolchin*, 111 F.3d at 1114. Even under a rational basis test, the tax on Mr. Smith fails to

comport with the Equal Protection Clause because there is no relationship between the goal and the burden. Quite simply, Mr. Smith is treated differently from every other Massachusetts attorney in good standing simply because he once practiced in New Jersey.

The New Jersey Supreme Court's new interpretation of the *pro hac vice* rule has no important objective or substantial relationship to the burden it imposes upon Mr. Smith. The Equal Protection Clause is violated by taxing Mr. Smith and requiring him to pay for those years in which he was an out-of-state attorney. Other out-of-state attorneys are not required to pay a similar tax in order to be admitted *pro hac vice*. Thus, Mr. Smith is penalized for having once practiced in New Jersey. The unique burden levied upon Mr. Smith's license is a violation of his rights under the Equal Protection Clause and must be struck down.

D. THE NEW JERSEY SUPREME COURT'S APPLICATION OF THE RULE PLACES AN UNDUE BURDEN UPON INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE.

The New Jersey Supreme Court's application of N.J. Ct. R. 1:28-1 to Mr. Smith also violates the Commerce Clause. The Commerce Clause of the Constitution prohibits the states from placing an undue burden on interstate commerce. U.S. Const. art. I, § 8, cl. 3. A law will be struck down if it burdens interstate commerce by favoring in-state economic interests over out-of-state interests. *Brown-Forman Distillers Corp. v. New York Liquor Auth.*, 476 U.S. 573, 579 (1986). Requiring Mr. Smith to pay into the Fund restricts his ability to practice law in New Jersey by invalidating his good standing in Massachusetts and preventing him from

engaging in commerce without any corresponding benefit to clients he has represented during that time period.

Even under the least restrictive test, the tax is an impermissible indirect burden on commerce. The tax significantly favors in-state economic interests over out-of-state interests by imposing a career-long burden upon New Jersey attorneys. When a regulation indirectly impacts interstate commerce, there must be a legitimate relationship between the burden imposed and the goal of the state. *Id.* "Regulatory measures designed to benefit in-state economic interests by burdening out of state competitors" are a form of economic protectionism expressly prohibited by the Commerce Clause. *Tolchin*, 111 F.3d at 1106. Requiring Mr. Smith to pay 17 years of back taxes in order to be admitted *pro hac vice* is a form of economic protectionism that discriminates against Mr. Smith, a Massachusetts attorney. Moreover, the expressed purpose of the Fund is to protect New Jersey clients from their dishonest attorneys. N.J. Ct. R. 1:28-1(a). Although requiring attorneys admitted *pro hac vice* to pay into the Fund while they are actually practicing in New Jersey rationally satisfies the purpose behind the creation of the Fund, the purpose of the Fund is not satisfied by requiring every attorney ever admitted to practice in New Jersey to pay into the Fund for the duration of that attorney's legal career, even well after he or she has left the State to practice on a full-time basis in another jurisdiction.

Additionally, a statute cannot impose a burden that is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). If the burden imposed is minimal, it will only be tolerated if the statutory purpose cannot be effectuated by less intrusive means. *Id.* The State's burden upon Mr. Smith violates the

Constitution because less intrusive alternatives exist, such as Delaware's use of an "inactive" status for attorneys similarly situated to Mr. Smith. "Inactive" attorneys are required to pay minimal annual assessments, but are exempt from the full assessments applicable to attorneys actually practicing law in the state. Del. R. 69. (App. 80). An "inactive" attorney who wishes to represent a client in Delaware can affiliate with an active member of the Delaware bar, who would then apply for admission *pro hac vice* on behalf of the inactive member. Del. R. 71. Alternatively, the inactive attorney can re-register as "active" and pays the necessary assessments for that year. A similar system in New Jersey would provide equity and require attorneys actually representing clients in New Jersey to bear the burden of the Fund.

Moreover, the State cannot impose a tax upon an out-of-state resident who does not engage in commerce within the State. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Pursuant to a North Dakota statute, vendors who solicit business in the state by way of three or more advertisements within a twelve-month period were required to remit a use tax to the state. Quill Corporation challenged the statute, which taxed its solicitation of business by mail-order catalogs even though the company was not located in North Dakota. *Id.* at 302-03. The Court held that the tax constituted an undue burden upon interstate commerce. Such a tax may only be upheld under the Commerce Clause if it "is applied to an activity with a substantial nexus with the taxing State . . . a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause." *Id.* at 311.

Similarly, in the case at bar, taxing Mr. Smith violates the Commerce Clause. Although Mr. Smith at one time obtained a New Jersey license to practice law, he moved his practice to Massachusetts over 17 years ago. Given the stated purpose of the Fund, there is no "substantial nexus" that would permit the tax for those years in which he was not present and during which did not practice law in New Jersey. The only contact that Mr. Smith had with New Jersey practice during that period was an unexercised law license he obtained in 1978, but under which he no longer practices law. Such minimum contacts are insufficient to warrant an imposition of a tax under the Commerce Clause.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Supreme Court of New Jersey.

Respectfully submitted,

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SUPREME COURT OF NEW JERSEY
A-22 September Term 2002

BOSTON UNIVERSITY,

Plaintiff-Respondent,

v.

UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY,

Defendant and Third-Party Plaintiff-Appellant,

v.

ALTEC, INC,

Third-Party-Defendant.

Argued February 3, 2003 – Decided May 7, 2003

On certification to the Superior Court, Law Division, Essex County.

Douglas K. Wolfson, Assistant Attorney General and *Rhonda S. Farber*, Deputy Attorney General, argued the cause for appellant (*David Samson*, Attorney General of New Jersey, attorney; *Andrea M. Silkowitz*, Assistant Attorney General, of counsel; *Ms. Farber*, on the briefs).

Irvin M. Freilich argued the cause for respondent (*Robertson, Freilich, Bruno & Cohen*, attorneys; *Mr. Freilich, Gary N. Donner* and *Jennifer A. Leighton*, on the briefs).

The opinion of the Court was delivered by ZAZZALI, J.

In this appeal we must decide whether a licensed New Jersey attorney who is ineligible to practice law in this

state nonetheless may rely on his good standing in another jurisdiction to appear *pro hac vice*. We hold that a licensed New Jersey attorney must be a member in good standing of the New Jersey Bar before he or she may appear *pro hac vice*.

I

Robert B. Smith, Esq., became a licensed New Jersey attorney in 1978 and thereafter practiced law in this state for approximately three years. Smith moved to Massachusetts in 1986 and began a practice there after being admitted to the bar. Since that date, Smith has not paid his annual fees to the New Jersey Lawyers' Fund for Client Protection (Client Protection Fund), as required by *Rules* 1:20-1(b) and 1:28-2. As a result, this Court annually has issued Orders that declare him ineligible to practice in this state. Smith now owes the Client Protection Fund approximately $2,489 in arrearages.

Currently, Smith serves as Associate General Counsel for plaintiff, Boston University (BU). BU moved before the trial court pursuant to *Rule* 1:21-2 to admit Smith *pro hac vice* to assist local counsel in a breach of contract action against defendant University of Medicine and Dentistry of New Jersey (UMDNJ). In connection with BU's motion, Smith submitted a certification in which he asserted that he is a member in good standing of the Massachusetts Bar. Smith did not disclose his status as a licensed New Jersey attorney.

In opposition to BU's motion, UMDNJ, represented by the Attorney General, argued that Smith should not be permitted to appear *pro hac vice* until he pays all amounts due the Client Protection Fund. The trial court disagreed,

reasoning that Smith's good standing as a member of the Massachusetts Bar satisfies the requirements for *pro hac vice* admission. On his admission to practice *pro hac vice* in June 2002, Smith submitted payment to the Client Protection Fund for that year, as required by *Rule* 1:21-2(a), but did not pay his arrearages.

UMDNJ moved for reconsideration. In support of that motion, Kenneth J. Bossong, Director and Counsel to the Client Protection Fund, certified that an ineligible New Jersey attorney in arrearages for more than one year will not be deemed eligible merely because he or she makes a single year's payment of fees to the Client Protection Fund for the purpose of securing *pro hac vice* admission. Bossong explained that this Court requires payment of all arrearages before a licensed New Jersey attorney becomes eligible to practice again. Moreover, the Clerk of this Court certified that an attorney licensed in New Jersey may not receive a Certificate of Good Standing until that attorney pays all outstanding amounts he or she owes to the Client Protection Fund. After reviewing UMDNJ's submissions, the trial court again concluded that there was no reason to deny Smith *pro hac vice* admission.

UMDNJ moved for leave to appeal and the Appellate Division suggested in granting the motion that this Court consider the matter on direct certification. This Court subsequently certified UMDNJ's appeal on its own motion pursuant to *Rule* 2:12-1.

II

The New Jersey Constitution vests this Court with plenary authority to regulate the practice of law in this state. *N.J. Const.* art. VI, § 2, ¶ 3. Pursuant to that authority, the

Court has promulgated rules that require all New Jersey attorneys to pay an annual assessment of fees. *Rule* 1:20-1(b) provides that all individuals with a license to practice law in New Jersey must pay an annual fee to the Disciplinary Oversight Committee to support this Court's attorney-discipline and fee-arbitration systems. In addition, *Rule* 1:28-2 requires that attorneys pay an annual fee for the reimbursement of clients who have incurred financial losses because of dishonest attorney conduct.[1]

The Client Protection Fund collects those fees in accordance with the standards provided by *Rule* 1:28-2 and maintains a list of the names of attorneys who fail to pay. Pursuant to *Rules* 1:20-1(b)-(c) and 1:28-2, this Court annually issues an Order declaring that each attorney whose name appears on that list may not practice law in New Jersey until he or she pays any outstanding amounts due the Client Protection Fund. The Client Protection Fund then mails each ineligible attorney a copy of that Order with instructions on seeking reinstatement.

Acknowledging that Smith is ineligible to practice in New Jersey, BU nonetheless urges that Smith be allowed to appear *pro hac vice*. BU relies on *Rule* 1:21-2(a), which specifies the conditions under which an attorney may seek *pro hac vice* admission:

> An attorney of any other jurisdiction, of good standing there, whether practicing law in such

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[1] Since 1999, the annual assessment of attorneys also has included a component to fund the New Jersey Lawyers Assistance Program (NJLAP). In July 2002, the Court formalized this requirement with an amendment to *Rule* 1:28B. *See R.* 1:28B-1(e).

> other jurisdiction as an individual member or employee of a partnership . . . authorized to practice law in such other jurisdiction, *or* an attorney admitted in this state, of good standing, who does not maintain in this state a bona fide office for the practice of law may, at the discretion of the court in which any matter is pending, be permitted, *pro hac vice,* to speak in such matter in the same manner as an attorney of this state who maintains a bona fide office for the practice of law in this state and who is therefore, pursuant to *R.* 1:21-1(a), authorized to practice in this state. No attorney shall be admitted under this rule without annually complying with *R.* 1:20-1(b), *R.* 1:28-2, and *R.* 1:28B-1(e) during the period of admission.
>
> [(Emphasis added).]

BU argues that because *Rule* 1:21-2(a) is written in the disjunctive Smith may rely solely on his good standing in Massachusetts to appear *pro hac vice.* As BU reads *Rule* 1:21-2(a), status as a licensed New Jersey attorney is irrelevant when *pro hac vice* admission is sought on the basis of a foreign license.

We disagree. In addition to the prerequisites for *pro hac vice* admission contained in part a of *Rule* 1:21-2, part b(1) of that rule provides that those attorneys who are granted *pro hac vice* status must "abide by [the New Jersey Court] rules." *Rule* 1:21-2(b)(1). This Court's "Rule-making authority may be exercised by the promulgation of formal rules to be included in the published Rules of Court . . . [or] in the form of general directives or specific orders." *In re Yaccarino,* 101 *N.J.* 342, 351 (1985); *see also State v. Clark,* 162 *N.J.* 201, 205 (2000); Pressler, *Current N.J. Court Rules,* comment on *R.* 1:1-1 (2003). Numerous

Orders indicate that Smith may not practice law in this state until he pays his fees to the Client Protection Fund. Those Orders are clear, admit of no exception, and must be enforced strictly by our courts. Accordingly, Smith must pay the fees required by *Rules* 1:20-1(b) and 1:28-2, including all arrearages, before he may appear *pro hac vice.*

BU urges an interpretation of *Rule* 1:21-2 that would permit Smith to practice law before the New Jersey courts while freely shirking the financial obligations he incurred as a member of this state's bar. That reading of the Rule necessarily would produce an anomalous result, and the Court's Rules should not be so construed. *G. v. C.,* 172 *N.J. Super.* 123, 128 (Law Div. 1978), *aff'd,* 172 *N.J. Super.* 360 (App. Div. 1979). A license to practice law is a privilege burdened with conditions. *In re Pennica,* 36 *N.J.* 401, 433 (1962). Smith has elected to maintain his license to practice law in New Jersey, thereby preserving his right to seek immediate reinstatement as an attorney in good standing. This Court will not sanction Smith's decision to retain that benefit while he disregards his concomitant obligation to the Client Protection Fund.

III

We now address Smith's failure to disclose in his certification to the trial court that he is currently ineligible to practice law in New Jersey. After oral argument, we provided Smith with an opportunity to respond to our concerns regarding his nondisclosure. Smith responded by affidavit and BU submitted a letter brief in support of Smith's position. UMDNJ filed a response to BU's letter brief.

"A lawyer shall not knowingly fail to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure." *RPC* 3.3(a)(5). *See Kosmowski v. Atlantic City Med. Ctr.*, 175 *N.J.* 568, 577 (2003) (LaVecchia, J., concurring) ("The duty to disclose material facts applies with equal force to matters relating to the substance of the underlying claim as well as to those that relate to procedural issues affecting management of the case."). For nearly two decades this Court has issued annual Orders indicating that Smith is ineligible to practice in this state because he failed to pay the fees required by *Rules* 1:20-1(b) and 1:28-2. Smith asserts, however, that he relied solely on the explicit language of *Rule* 1:21-2(a) in filing his certification for *pro hac vice* admission, that he was "not entirely clear" concerning his status before the New Jersey Bar, and that he never intended to mislead the trial court or UMDNJ.

Although we remain concerned about Smith's failure to mention his status as a New Jersey attorney, we will not refer this matter to the ethics authorities for further action. We emphasize, however, that pursuant to *Rule* 1:21-2(b)(1), qualifying for *pro hac vice* admission on the basis of good standing in another jurisdiction will not exempt a New Jersey attorney from the Rules and Orders that govern his or her practice before our courts. Thus, New Jersey attorneys who are not in good standing in this state must disclose that fact when they seek to appear *pro hac vice* under *Rule* 1:21-2.

IV

In conclusion, we hold that a licensed New Jersey attorney must be a member in good standing of the New

Jersey Bar before he or she may appear *pro hac vice.* Under *Rule* 1:21-2(b)(1), an attorney's appearance before our courts is conditioned expressly on that attorney's compliance with the Court Rules, including specific Orders. In this appeal, the trial court granted Smith permission to appear *pro hac vice* on the basis of his good standing in another jurisdiction. That permission, however, does not exempt Smith from this Court's Orders declaring that he remain ineligible to practice law in this state until he remits full payment to the Client Protection Fund.

If Smith remits full payment to the Client Protection Fund, including all arrearages, within thirty days of this decision and promptly thereafter obtains a Certificate of Good Standing from the Clerk of this Court, he then may represent BU in its contract dispute with UMDNJ. If Smith does not comply with the foregoing requirements, the trial court shall revoke Smith's permission to appear *pro hac vice* pursuant to *Rule* 1:21-2(d).

Further, we refer *Rule* 1:21-2 to the Civil Practice Committee for appropriate clarification consistent with this opinion.

We remand this matter to the trial court for further proceedings.

CHIEF JUSTICE PORITZ and JUSTICES COLEMAN, LONG, VERNIERO, LaVECCHIA, and ALBIN join in JUSTICE ZAZZALI's opinion.

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Attorneys for Plaintiff Boston University

BOSTON UNIVERSITY **Plaintiff,** **vs.** **UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY,** **Defendant.**	**SUPERIOR COURT OF NEW JERSEY, LAW DIVISION: ESSEX COUNTY DOCKET NO.: ESX-L-007302-01** **Civil Action** **ORDER GRANTING ADMISSION *PRO HAC VICE*** (Filed Jun. 21, 2002)

This matter having been opened to the Court by Robertson, Freilich, Bruno, Cohen, LLC, counsel for plaintiff, by way of notice of motion for the admission *pro hac vice* of Robert B. Smith, Esq. in the above-captioned matter, and the Court having considered the application and supporting certifications submitted herewith, and any opposition filed, and it appearing that the conditions of New Jersey Court Rule 1:21-2 have been met, and for good cause shown,

IT IS on this 21st day of June, 2002,

ORDERED that Robert B. Smith, Esq., be and hereby is admitted *pro hac vice* to appear in this matter on behalf of plaintiff; and it is further

ORDERED that Robert B. Smith, Esq. shall abide by the New Jersey Court Rules, including all disciplinary rules; and it is further

ORDERED that Robert B. Smith, Esq. shall make payment to the Disciplinary Oversight Committee as provided by New Jersey Court Rule 1:20-1(b) for any year in which he continues to represent plaintiff in this matter; and it is further

ORDERED that Robert B. Smith, Esq. shall make payment to the New Jersey Lawyers' Fund for Client Protection as provided by New Jersey Court Rule 1:28-2(a) for any year in which he continues to represent plaintiff in this matter; and it is further

ORDERED that Robert B. Smith, Esq. shall consent to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against him that may arise out of his participation in this matter; and it is further

ORDERED that Robert B. Smith, Esq. shall notify the court immediately of any matter affecting his participation in this matter; and it is further

ORDERED that Gary N. Donner and the law firm of Robertson, Freilich, Bruno, Cohen, LLC, shall be held responsible for Robert B. Smith, Esq. and for the conduct of this matter; and it is further

ORDERED that all pleadings, briefs, and other papers filed with the court shall be signed by Robertson, Freilich, Bruno, Cohen, LLC, attorneys of record for the plaintiff, who shall be held responsible for said papers.

IT IS FURTHER ORDERED that a copy of this Order shall be served on all parties within 7 days of the entry hereof.

/s/ Stephen J. Bernstein
HONORABLE
STEPHEN J. BERNSTEIN
JUSTICE OF THE
SUPERIOR COURT
Stephen J. Bernstein,
J.S.C.

SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART
ESSEX COUNTY
DOCKET NO. L-7302-01
A.D. #_____

BOSTON UNIVERSITY,

Plaintiff,

Vs.

UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY,

Defendant.

TRANSCRIPT OF MOTION

Place: Hall of Records
465 Dr. Martin Luther King Blvd.
Newark, New Jersey 07102
Date: June 21, 2002

BEFORE:

HONORABLE STEPHEN J. BERNSTEIN, J.S.C.

TRANSCRIPT ORDERED BY:

RHONDA FARBER, ESQ., DEPUTY ATTORNEY GENERAL

APPEARANCES:

GARY N. DONNER, ESQ. (Robertson Freilich Bruno & Cohen) Attorney for Plaintiff, Boston University

RHONDA FARBER, ESQ., DEPUTY ATTORNEY GENERAL MICHAEL J. GONNELLA, ESQ., DEPUTY ATTORNEY GENERAL Attorney for Defendant, UMDNJ

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[3] THE COURT: *Boston University vs s. UMDNJ.*

(Pause)

THE COURT: Good morning. You want to enter your appearances please?

MR. DONNER: Gary Donner with Robertson, Freilich, Bruno and Cohen for plaintiff, Boston University.

MS. FARBER: Your Honor, Rhonda Farber, District – Deputy Attorney General representing UMDNJ.

MR. GONNELLA: Good morning, Judge. Michael Gonnella, Deputy Attorney General also representing the University.

THE COURT: Okay. All right, Mr. Donner, this is your application for pro hac vice.

MR. DONNER: Yes, Your Honor.

THE COURT: Pro hac vice admittance application. Is there anything else you want to say?

MR. DONNER: Well, I would just like to reiterate the three points in our latest submission to the Court in that Mr. Smith, who is Associate General Counsel for Boston University has shown good cause why he should be admitted pro hac vice in this matter. He's been Associate General Counsel for Boston University for over 11 years. He's participated in numerous litigations on behalf of Boston University. [4] He's developed an intimate attorney/client relationship with Boston University. And foremost the trustees of – of Boston University, the plaintiff in this matter have requested that Mr. Smith participate in this litigation along with local counsel. To those reasons I believe that – that good faith – good cause has been shown pursuant to – to New Jersey Court Rule 1:21-2.

The arrears matter I'd like to address as well.

THE COURT: I – I find it to be a non-issue. If he had paid all his dues and stayed a member of New Jersey you wouldn't even have to bother making this application, right?

MR. DONNER: That's correct, if he had never practiced here, Your Honor, he would not.

THE COURT: Right. No, I'm saying if he had continued to be a member in New Jersey and paid his dues every year you wouldn't be making – if he didn't move to Massachusetts you wouldn't need to make this application.

MR. DONNER: That's correct. He would do it without further order of the Court. And lastly the issue of

labeling Mr. Smith as a fact witness or a potential fact witness, the latest certifications [5] indicate that Mr. Smith was not involved in the negotiations for the drafting of the contract that that's in dispute in this case. The communications between Mr. Smith and Miss Farber – during this litigation and they were both acting as counsel for their respective clients. If Mr. Smith would be – could be labeled as fact witness or a potential fact witness then so could Miss – Miss Farber.

For those reasons, Your Honor, I believe that good cause has been shown and that Mr. Smith should be admitted pro hac vice.

THE COURT: Miss Farber.

MS. FARBER: Thank you, Your Honor. I want to address the issue of Mr. Smith's ineligibility to practice law in the State of New Jersey.

THE COURT: Well he wouldn't need to be filing for pro hac vice if he was admitted in New Jersey.

MS. FARBER: But, Your Honor, he – there is a rule from our Supreme Court stating that he is not eligible to practice law in this State.

THE COURT: Well, I got a problem. If he was eligible to practice why would he need to file a pro hac vice application?

MS. FARBER: Your Honor, the – the pro hac [6] vice rule is intended for an attorney who are in good standing in their home state to enter into litigation in –

THE COURT: Is there anything that indicates he's not eligible –

MS. FARBER: Or –

THE COURT: – or has any – that he isn't in good standing in – in Massachusetts?

MS. FARBER: – or – or as Mr. – no, in Massachusetts it's not an issue. It – it's the order that stands in New Jersey that prohibits him, Your Honor, unless he follows certain procedures, from practicing law in this State. It doesn't give an exception for pro hac vice admissions, Your Honor, and I don't believe it's intended to, nor do I believe that the pro hac vice rule itself provides for individuals who are not in good standing to practice law in this State to be admitted pro hac vice. If we took that to its logical conclusion Mr. Smith could avoid paying his – his client security fund dues forever and simply be admitted pro hac every time he wanted to involve himself in New Jersey litigation, which I think would thwart the purpose of the client security fund rule and it – and it certainly contravenes the purpose of the pro hac vice rule and it's standard. And, Your Honor, [7] respectfully I believe that Mr. Smith's ineligibility to practice in this State is a serious counter – factor that you should consider when you weigh whether or not he should practice in this State.

Moreover Mr. Smith is indeed a fact witness in this case. He count – in fact the certification that he submitted only underscores that he – he is a fact witness in this case.

THE COURT: How – what information are you alleging he has about the case?

MS. FARBER: Well, first of all –

THE COURT: Other than as an attorney.

MS. FARBER: He – he is an – actually he's an employee of – of Boston University and he took it upon himself, in particular just most recently, to thwart a specific position of the contract between the parties and unilaterally changed the terms of it putting Boston University in breach again of an expressed term of the contract. Now when Mr. Donner says that I'm equal – I would be equally a witness in the case, it – it's a specious argument, Your Honor. I – I took no such action. Mr. – Mr. Smith was acting at every –

THE COURT: What if Mr. Smith were outside counsel and sent the same letter to you, would he – [8] would he not be a witness?

MS. FARBER: Outside counsel, Your Honor, I don't believe acted – acted to make a decision to change the terms of the contract that was between the parties. Outside counsel may have counseled their client what to do, but –

THE COURT: But what if you got an attorney from – a letter from outside counsel saying with regard to the contract we're only gonna allow an audit of such and such records?

MS. FARBER: But, Your Honor, those are fact sensitive questions and that's one of the reasons that Mr. Smith is a fact witness. In addition to that if you look at his certification, look at paragraph ten, he says that he's intimately familiar with legal and business affairs and that is one – one of the reasons that he is by definition a fact witness. Moreover if you look at Dennis Hart's (phonetic) certification – sorry, my – my stuff got stapled together, if you look at Dennis Hart's certification he certifies that Mr. Smith became involved in this matter in

the spring of 2001. Well, Your Honor, that was pre-litigation. Mr. Smith has been involved in the facts of giving rise to this litigation prior to its inception by his own certification, by certification of Dennis Hart and – [9] and by my assertion as to his conduct regarding the contract in question. It is an express term of the contract, Your Honor. Anything – I mean, I won't address the threshold issue of – of showing it's good cause because – although Mr. Donner was asking the court to infer good cause, other than stating it in his original application, I think that we can – our argument on – on the counter – which was substantive, Your Honor. I don't think that we can lightly overlook an order of the Supreme Court of New Jersey.

THE COURT: Mr. Donner, anything further?

MR. DONNER: Only – I would just add, Your Honor, that paragraph ten, you know, any attorney – any in house counsel is intimately familiar with – with their client's position, their legal and business affairs. This does not say that he had anything to do with the contract in dispute here and Mr. Hart's certification supports that. As far as the – the request for the audit, the letter, it – it clearly states in Mr. Smith's letter to Miss Farber that they're – that they're willing to go ahead with the audit. The fact that an attorney representing his client suggested the scope of the request for the audit is a bit broad, does not make him make him a fact witness in this case.

[10] MS. FARBER: Your Honor, just one other item. I'd like for it to be known for the record that Mr. Smith is in fact still licensed to practice law in New Jersey and as a New Jersey lawyer he's subject to all of the rules

of – of professional conduct that governs all of us who are licensed to practice in New Jersey.

THE COURT: Well he would be subject to those rules under pro hac vice admission wouldn't he?

MS. FARBER: No, he – not – not if your interpreting them as narrowly as I think they're being interpreted. Mr. – in other –

THE COURT: I think anyone who comes into this State is gonna practice under pro hac vice is subject to our rules and admits that it is subject to this rule.

MS. FARBER: That's right, but he is not – he is not merely a foreign attorney coming in to be admitted pro hac vice, he is a licensed New Jersey attorney who –

THE COURT: Not anymore.

MS. FARBER: – has been – has been deemed – yes, he's still licensed, Judge. He's been deemed ineligible to practice.

THE COURT: Okay. Well I think if you're ineligible you're not licensed. Look, Miss Farber, [11] I've heard your argument. I'm satisfied based on the admission that there's a reasonable basis for Mr. Smith be – being admitted pro hac vice. I don't agree with defense counsel's arguments regarding his not paying his client security fund for the last 18 years, since he's been out of the State for the last 18 years, obviously he's – he's given up his New Jersey admission. He now wishes to be admitted pro hac vice. I don't see where it's necessary for him to go back if in fact he was paying his dues and – and an active member of the New Jersey Bar he wouldn't need to have filed for a pro hac vice admission to begin with. I am not satisfied

that any of the papers indicate that Mr. Smith is a witness in this case, has any firsthand knowledge regarding the contact that's breached and some negotiations later as to the scope of arbitration under the lease is purely a legal issue and has nothing to do with the facts of the case. I don't find – I will – I will due want to indicate to plaintiff's counsel, however, I would suggest that I not hear later on that Mr. Smith is named as a fact witness in the case or intends to be called in this case. It would make me very unhappy. All right?

MR. DONNER: I understand, Your Honor.

THE COURT: Okay.

[12] MS. FARBER: Your Honor, I have one question please. Is the – is the Court stipulating that because Mr. Smith is ineligible to practice law that he is no longer licensed in this State?

THE COURT: Miss Farber, he's admitted pro hac vice only for this case. That's all this order will allow him to do.

MS. FARBER: But the Court made a statement earlier that since he was ineligible – ineligible to practice that he had forfeited his license –

THE COURT: He is ineligible to practice in any other cases unless he has a pro hac vice admission order as far as I know. All right?

MS. FARBER: Your Honor, respectfully I'm gonna ask for a stay of the – of the implementation of this order.

THE COURT: A stay?

MS. FARBER: A stay.

THE COURT: Okay. Denied. Go ahead. I've ruled.

(Proceedings concluded)

[13] CERTIFICATION

I, GAIL M. TORNETTA, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on Tape number 1, index number from 0816 to 1497, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate noncompressed transcript of the proceedings as recorded.

/s/ Gail M. Tornetta
GAIL M. TORNETTA AOC #511
G&L TRANSCRIPTION OF NJ Date: July 3, 2002

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Attorney for Defendant/Third-Party Plaintiff

Boston University, Plaintiff(s), v. University of Medicine and Dentistry of New Jersey, Defendant(s)/Third-Party Plaintiff, and Altec, Inc., Third-Party Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – ESSEX COUNTY DOCKET NO.: ESX-L-7302-01 CIVIL ACTION ORDER (Filed Aug. 2, 2002)

This matter having been opened to the Court on Motion of the Attorney General of New Jersey, Deputy Attorney General Rhonda S. Farber appearing, for this Court's Reconsideration of its June 21, 2002 Order admitting Robert B. Smith to practice law in this matter pro hac vice; and the Court having read and considered the additional information supplied by the State and the memorandum in support of the motion and the Court having

reconsidered its Order in view of said additional information; and the Court being satisfied that Robert B. Smith is not in compliance with R. 1:21-2(a) at this time it is therefore

[Paragraph deleted by Judge and marked Denied.*

ORDERED that a true copy of this Order be served on the Plaintiff's attorney of record within seven days of its receipt by the moving party.

Dated: August 2, 2002 /s/ Stephen J. Bernstein, JSC
Stephen J. Bernstein, J.S.C.
Stephen J. Bernstein, J.S.C.

No oral argument was requested.

* [for the reasons stated on the record at the last oral argument on 6/21/02. No new information has been submitted.]

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By: Rhonda S. Farber,
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University of Medicine and Dentistry of New Jersey

BOSTON UNIVERSITY, Plaintiff, v. UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, Defendant/Third-Party Plaintiff, v. ALTEC, INC., Third-Party Defendant	**SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY DOCKET NO. ESX-L-007302-01** **Civil Action** **ORDER REVOKING *PRO HAC VICE* ADMISSION OF ROBERT B. SMITH [Rule 1:21-2(d)]** (Filed Jul. 11, 2003)

This matter having been opened to the Court by Peter C. Harvey, Acting Attorney General of New Jersey, attorney for the Defendant/Third-Party Plaintiff, University of Medicine and Dentistry of New Jersey, Deputy Attorney General Rhonda S. Farber, appearing, for an Order to enforce the May 7, 2003 Order of the Supreme Court of New Jersey, which Order is annexed hereto and incorporated by reference as though set forth here at length,

which Order mandates the **revocation** of this Court's June 21, 2002 Order Granting Admission *pro hac vice* to Robert B. Smith, Esq., for his failure to comply with the requirements mandated by the Supreme Court Order; and the Court having reviewed the Certification of Counsel in support of this motion and any other arguments of counsel, and the Court being of the opinion that there is good cause for the entry of this Order, now therefore, it is on the 11th day of July 2003,

ORDERED that this Court's June 21 Order Admitting Robert B. Smith, Esq., to appear in this matter *pro hac vice*, is herewith **revoked**, for reasons set forth in the Certification of Rhonda S. Farber, Deputy Attorney General, and for reasons set forth in the May 7, 2003 Order of the Supreme Court of New Jersey; and it is further

ORDERED that a true copy of this Order be served on all parties and upon the Clerk of the Supreme Court of New Jersey within five days of the receipt of this Order by the moving party.

/s/ Stephen J. Bernstein, JSC
Hon. Stephen J. Bernstein, J.S.C.

SUPREME COURT OF NEW JERSEY
Docket No. 53-601

BOSTON UNIVERSITY Plaintiff-Respondent, v. UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, Defendant/Third-Party Plaintiff-Appellant. v. ALTEC, INC., Third-Party Defendant.	CIVIL ACTION ON DIRECT CERTIFICATION FROM THE SUPREME COURT OF NEW JERSEY: SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. Sat Below: Honorable Stephen J. Bernstein, J.S.C.

PLAINTIFF-RESPONDENT'S BRIEF

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On the Brief:
Irvin M. Freilich, Esq.
Gary N. Donner, Esq.
Jennifer A. Leighton, Esq.

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PRELIMINARY STATEMENT

Robert B. Smith was admitted to practice *pro hac vice* before the courts of New Jersey to represent Plaintiff-Respondent Boston University ("BU") in its contract dispute with Defendant/Third-Party Plaintiff-Appellant University of Medicine and Dentistry of New Jersey ("UMDNJ"). Pursuant to R. 1:21-2, Mr. Smith, a resident of Massachusetts, was admitted because he is a member in good standing of the bar of the state in which he primarily practices, Massachusetts, and because BU demonstrated good cause to support his *pro hac vice* admission. Although the trial court has wide discretion in admitting attorneys *pro hac vice*, Defendant appealed Mr. Smith's admission, arguing that Mr. Smith's prior status as a New Jersey attorney disqualified him from *pro hac vice* admission because, since leaving New Jersey practice nearly two decades ago, Mr. Smith has not made annual fee payments required of practicing in-state attorneys to the Lawyer's Fund for Client Protection ("the Fund").

Mr. Smith was admitted *pro hac vice* under the trial court's discretion, pursuant to the plain language of the Rule. Defendant's argument ignores the disjunctive nature of R. 1:21-2, which by its express terms permits *pro hac vice* admission for a member in good standing of any other jurisdiction *or* a New Jersey attorney, in good standing, who does not maintain a *bona fide* office in New Jersey. By its appeal, Defendant seeks to have Mr. Smith pay the equivalent of 16 years of arrearages to the Fund over and above what is required by the Rule, which is payment for the time during which he is admitted *pro hac vice*. Such an interpretation of the Rule is incorrect and violates Mr. Smith's constitutional rights.

To overturn the ruling of the trial court, this Honorable Court must determine that the plain language of R. 1:21-2 requires that an attorney, who left the practice of law in New Jersey nearly two decades ago, must pay all arrearages to the Fund in order to obtain *pro hac vice* admission. Given the explicit language of the Rule, such a determination is unjustifiable. Mr. Smith satisfies the plain language of the Rule, as he is an attorney in good standing in another jurisdiction. Any alteration of this Rule that impinges upon Mr. Smith's rights violates the United States Constitution.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Respondent BU is a non-profit Massachusetts corporation, which has filed a civil lawsuit in the Superior Court of New Jersey to recover damages from UMDNJ for breach of an April 1, 1999 research agreement. (Da1a) The Trustees of BU have asked their Associate General Counsel, Robert B. Smith, Esq., to represent their interests in this lawsuit, together with local counsel. (Da60a) As a consequence of BU's request that Mr. Smith actively participate in this matter, BU petitioned the trial court for an order admitting Mr. Smith *pro hac vice* under Rule 1:21-2(a). BU, Mr. Smith's employer and his only client for more than eleven (11) years, requested that Mr. Smith seek *pro hac vice* admission to curtail the growing legal fees that had been incurred as a result of UMDNJ's litigation tactics. (Da74a)

There is no dispute that Mr. Smith is a member in good standing of the bar of the highest court of the Commonwealth of Massachusetts. And it was on that basis and

the facts submitted by BU in support of its application that the trial court, in its discretion, found that Mr. Smith met the requirements of R.1:21-2(a) and that good cause had been demonstrated to support his *pro hac vice* application. (Da78a) UMDNJ's initial opposition to BU's application claimed that Mr. Smith was a fact witness in this case as a result of telephone communications that he had with UMDNJ's counsel during the course of this litigation. (Da65a) As a result of those conversations, UMDNJ asserted that Mr. Smith should be disqualified from representing BU in this matter. (*Id.*) That argument was rejected by the trial court, and UMDNJ does not raise that specious issue on appeal. UMDNJ also opposed Mr. Smith's motion based upon the fact that he once practiced law in New Jersey and had not made any payments to the Fund for more than sixteen years. (*Id.*)

In the exercise of his sound discretion, the Honorable Stephen J. Bernstein, J.S.C., by order dated June 21, 2002, admitted Mr. Smith *pro hac vice*. (Da78a-79a).

UMDNJ goes to great lengths in its briefs to castigate Mr. Smith for not including in his supporting certification the fact that he was a member of the New Jersey bar. (Dsb12-15) In so doing, UMDNJ distorts the true facts and creates the impression that Mr. Smith was attempting to hide material facts from UMDNJ and the court. Nothing could be further from the truth. Counsel for UMDNJ knew that Mr. Smith was a member of the New Jersey bar based upon a conversation that she had with Irvin M. Freilich, Esq., local counsel for BU, a couple of months before the *pro hac vice* application. (Psa2) And more importantly, the trial judge was fully aware of Mr. Smith's status as a New Jersey admitted attorney *before* granting the motion. (T4-8)

In the exercise of his discretion, the trial judge determined that Mr. Smith satisfied the requirements of the Rule and granted the *pro hac vice* motion. (Da78a) Judge Bernstein's ruling is based upon the correct interpretation of R. 1:21-2(a), which unequivocally allows "an attorney of any other jurisdiction of good standing there . . ." to be admitted *pro hac vice*. In making its decision, the trial court relied upon Mr. Smith's status as an attorney in good standing of the highest court of the Commonwealth of Massachusetts, the fact that Mr. Smith has been Associate General Counsel for BU for over 11 years (T. 3:24), and the fact that BU requested that Mr. Smith represent it in this litigation, along with local counsel, in order to reduce the legal fees for BU, a non-profit corporation. (Da74a)

Shortly after the court granted Mr. Smith's motion to be admitted *pro hac vice*, UMDNJ filed a motion seeking reconsideration of the trial court's order. (Da80a) Judge Bernstein denied UMDNJ's motion for reconsideration, noting that UMDNJ failed to supply the court with any new information or arguments. (Da90a).

In compliance with the Court rules and Judge Bernstein's Order, Mr. Smith tendered payment in the amount of $170 to the Fund for the current year. (Dsa1sa) The Fund held this payment to be unacceptable. (Dsalsa) In so doing, UMDNJ, with the assistance of the Fund, violated the Order properly issued by the Superior Court.

By letter dated August 13, 2002, Mr. Smith requested the trial court's intervention so that he could participate fully in the litigation and move the case forward. (Dsa1sa) In response to Mr. Smith's request, Judge Bernstein, after speaking with "the Fund," by letter dated September 3, 2002, informed Mr. Smith of the Fund's reason for violating his

Order. (Dsa26sa) According to Judge Bernstein, the Fund stated that, despite the fact that Mr. Smith had not practiced law in New Jersey for over sixteen years, he was considered a New Jersey attorney for the purposes of being admitted *pro hac vice*. (*Id.*) In addition, the Fund advised Judge Bernstein that Mr. Smith may "avoid repayment of all these arrearages by submission of a letter of resignation from the New Jersey Bar at which time the arrearages would be vacated. . . ." (*Id.*)[1]

By letter dated September 11, 2002 to Judge Bernstein, BU's New Jersey counsel attempted to determine the effect, if any, that Judge Bernstein's conversation with the Fund had on the efficacy of the prior Order and on UMDNJ's motion for leave to appeal Mr. Smith's *pro hac vice* admission. (Dsa29sa) The September 11, 2002 letter also discussed Mr. Smith's willingness to consider the Fund's ultimatum to submit his resignation from the New Jersey bar, but only if it received assurances from UMDNJ that it would not object further to Mr. Smith's admission.[2] (Dsa30sa)

On September 18, 2002, Judge Bernstein stayed all further proceedings, including the Case Management

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[1] Even if Mr. Smith had accepted the ultimatum proffered by the Fund and submitted his letter of resignation, UMDNJ would have continued to oppose Mr. Smith's *pro hac vice* admission, based on its interpretation of the *pro hac vice* rule, which it claims requires an attorney to pay all arrearages before that attorney may resign from the practice of law. (See Dsb2,n.4)

[2] The relationship between counsel for UMDNJ and Mr. Smith was less than harmonious and this option was only being considered if it would have resolved the dispute. Counsel for UMDNJ never provided the assurance that was sought.

Conference scheduled for that day, and all depositions,[3] as a result of the Appellate Division's granting of UMDNJ's motion for leave to appeal. (Dsa36sa) Shortly after the Appellate Division's grant of review, this Court, by Certified Order, took up this appeal. (Dsa45sa)

In an effort to persuade this Court that the trial court not only erred, but overreached into the realm of attorney oversight – an area that is undisputably solely within this Court's sole jurisdiction – UMDNJ focuses exclusively on the fact that Mr. Smith was once admitted to practice in New Jersey. However, defendant UMDNJ ignores the critical facts. Mr. Smith currently resides in Massachusetts, where he practices law on a full-time basis as an Associate General Counsel for BU. (Da59a, 74a) He left New Jersey more than 16 years ago and has no intention of reinstating his plenary license to practice in New Jersey. As other attorneys who have left the state with no intention of returning, Mr. Smith has not paid money to the Fund during his more than 16-year absence from New Jersey. As the trial court concluded in the exercise of its discretion, however, that issue is not directly relevant to his application for *pro hac vice* admission under the language of R. 1:21-2(a). (T4-11) Pursuant to R. 1:21-2(a), Mr. Smith's current status as an attorney in good standing with the Commonwealth of Massachusetts alone is sufficient for him to be admitted *pro hac vice*.

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[3] Deposition notices were issued under Mr. Smith's signature on September 13, 2002 (Dsa33sa), because Mr. Smith had been admitted *pro hac vice*. That court order is still in effect.

ARGUMENT

I. IN THE EXERCISE OF DISCRETION, THE TRIAL COURT PROPERLY ADMITTED ROBERT SMITH UNDER THE DISJUNCTIVE STANDARD SET FORTH IN R. 1:21-2.

The issue in this appeal is not whether the Supreme Court has exclusive power to create rules governing appearances before its courts. It does. *See* N.J. Const. art. VI, § II, ¶ 3. The issue is not whether Mr. Smith has asked to be taken off the Ineligible List of the Supreme Court. (Dsb3). He has not. Nor is the issue whether Mr. Smith's representation of his client following the trial court's order admitting him *pro hac vice* constitutes the unauthorized practice of law. It does not.

Rather, the issue to be decided by this Court is whether the trial court properly concluded that Mr. Smith met the requirements of R. 1:21-2 in granting this motion for *pro hac vice* admission. Based upon the record before it, the trial court concluded that Mr. Smith complied with R. 1:21-2 and in the exercise of its discretion, it admitted him *pro hac vice* for this matter. In rendering its decision, the trial court also took into consideration all of the facts that are currently before the Court, including Mr. Smith's status as a member of the New Jersey Bar.

Not only does the language of R. 1:21-2 and its underlying policy support Mr. Smith's position, but so too do the administrative directives issued by the Administrative Office of the Courts. "Directives represent one method of exercising the constitutional powers bestowed on the Court and the Chief Justice. Until repealed, changed or superseded by subsequent directive, court rule, or Supreme Court opinion, they are binding statements on policies, practices,

and procedures and should be followed." Deborah T. Poritz, Chief Justice, *Foreward*, Compilation of Administrative Directives (1998).

A. STANDARD OF APPELLATE REVIEW.

Pursuant to R. 1:1-2, court rules, "shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

A motion for admission *pro hac vice*, is subject to the sound discretion of the trial court. *See* R. 1:21-2. The trial court's ruling should only be reversed if this Court finds that the trial court abused its discretion. *State v. Chappee*, 211 N.J. Super. 321, 334-35 (App. Div. 1986); *see also* R. 1:21-2, cmt.

B. THE TRIAL COURT PROPERLY CONCLUDED THAT BU's PRO HAC VICE APPLICATION MET THE REQUIREMENTS OF R. 1:21-2(a).

BU satisfied both the letter of R. 1:21-2(a) and its underlying policies in its application to admit Mr. Smith *pro hac vice*. The trial court, recognizing this, properly exercised its discretion in granting BU's application.

1. BU'S APPLICATION TO ADMIT MR. SMITH PRO HAC VICE COMPLIED WITH THE PLAIN LANGUAGE OF R. 1:21-2.

Although UMDNJ repeatedly asserts in its supplemental brief that the trial court's order admitting Mr.

Smith *pro hac vice* violated the plain language of R. 1:21-2(a), it tellingly does not once set forth the rule's language in its Supreme Court brief and relegates the rule to a footnote in its Appellate Division brief. The language of R. 1:21-2 is pivotal in this appeal. R. 1:21-2(a) provides, in relevant part:

> An attorney of any other jurisdiction, of good standing there, whether practicing law in such other jurisdiction as . . . an employee of a professional corporation . . ., *or* an attorney admitted in this state, of good standing, who does not maintain in this state a *bona fide* office for the practice of law may, at the discretion of the court in which any matter is pending, be permitted, *pro hac vice*, to speak in such matter in the same manner as an attorney of this state who maintains a *bona fide* office in this state. . . .
>
> (emphasis added.)

"The same principles of statutory construction apply to rule construction." *First Resolution Inv. Corp. v. Seker*, 171 N.J. 502, 511 (2002). Accordingly, where the rule is clear and unambiguous on its face, the Court "need delve no deeper than the act's literal terms to divine the Legislature's intent." *See id.* Because R. 1:21-2 is clear and unambiguous on its face, the trial court ended its inquiry after reviewing the plain language. So, too, should this Court.

BU moved for Mr. Smith's admission under the first prong of R. 1:21-2(a), as Mr. Smith is a member in good standing of the Massachusetts bar, the state in which he principally practices and has principally practiced for over eleven years. R. 1:21-2(a)(1)(A). The trial court properly concluded that R. 1:21-2 sets forth an either/or standard

and admitted Mr. Smith *pro hac vice* in spite of his ineligibility to practice full-time in New Jersey. The word "'or' carries with it natural disjunctive import." *See Pine Belt Chevrolet, Inc. v. Jersey Cent. Power & Light Co.*, 132 N.J. 564, 578 (1993). This Court has concluded repeatedly that the inclusion of disjunctive language in a statute allows it to choose among different prongs. *See, e.g., In re Adoption of Children by G.P.B.*, 161 N.J. 396, 406 (1999); *State v. Pennington*, 154 N.J. 344, 360 (1998); *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 19 (1994); *Brenner v. Berkowitz*, 134 N.J. 488, 506 (1993); *Lehmann v. Toys 'R' Us*, 132 N.J. 587, 606 (1993); *Carpet Remnant Warehouse, Inc. v. New Jersey Dep't of Labor*, 125 N.J. 567, 592 (1991); *McGuire v. Jersey City*, 125 N.J. 310, 319 (1991); *Massachusetts Mut. Life Ins. Co. v. Manzo*, 122 N.J. 104, 115 (1991).

In addition to this general rule of statutory interpretation, the Appellate Division has interpreted "or" as disjunctive in another section of R. 1:21-2, thus allowing an out-of-state attorney to be admitted *pro hac vice* upon meeting a single prong of the good cause test. The defendant in *L. Feriozzi Concrete Co. v. Mellon Stuart Co.*, 229 N.J. Super. 366, 367 (App. Div. 1988), applied to admit its counsel, licensed in Pennsylvania, *pro hac vice*. In its application, the defendant and its attorney claimed that good cause existed as a result of their longstanding relationship, the complexity of the case and the probability of extensive discovery in Pennsylvania. *Id.* After finding only one of these three reasons meritorious, the trial court denied the application. *Id.* The trial court based its reasoning on an unpublished opinion of this Court that it interpreted as holding the six factors in R. 1:21-2(a)(4) were *conjunctive*. *L. Feriozzi Concrete Co.*, 229 N.J. Super. at 368.

Reversing the trial court, the Appellate Division concluded that the rule's plain language allowed a court to admit an attorney *pro hac vice* upon the showing of only one of the good cause factors. *Id.* In addition to the rule's provision that an applicant show "at least one" prong, the *Feriozzi* Court noted that R. 1:21-2(a)(4) expressly provided that "[e]ach of the subparts *is clearly separated by the word 'or'*" (emphasis added.) 229 N.J. Super. at 368-69. Just as the *Feriozzi* Court interpreted the "or" language in subsection (a)(4) as disjunctive, so, too, should this Court interpret the same language in subsection (a)(1). Far from being a "tortured" application (see Dsb10), the trial court's application was a proper exercise of rule interpretation.

Rather than acknowledge that the trial court interpreted R. 1:21-2(a) as setting forth a disjunctive standard, UMDNJ argues that the trial court impermissibly created an exception to the rule. The trial court did not create its own "local rule" to admit Mr. Smith in this particular case.[4] Rather, the trial court applied R. 1:21-2 as written and has been previously interpreted by this Court. *Cf. Cunningham v. Rummel*, 223 N.J. Super. 15 (App. Div. 1988) (reinstating plaintiff's complaint where local rule sanction of dismissal inconsistent with R. 4:23-4 sanctions). As a result, its decision should be affirmed.

The trial court properly concluded that BU's application in favor of Mr. Smith's admission *pro hac vice* was

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[4] Trial courts are prohibited from making "local rules" inconsistent with this Court's Rules. As Chief Justice Hughes stated in Administrative Directive 6-74, 15-75, "[l]ocal rules of general applicability . . . contrary to specific provisions of the Rules Governing the Courts are prohibited."

complete. Subsection (a)(1)(A) requires that a certification state only that the attorney is "a member in good standing of the bar of the highest court of the state in which the attorney is domiciled or principally practices law." Notwithstanding UMDNJ's unfounded claims of misrepresentation, this subsection places no obligation on attorneys to list every state in which they are members, only the one in which they principally practice. Regardless, and notwithstanding the defendant's gross mischaracterizations,[5] the trial court knew of Mr. Smith's dormant New Jersey licensure at the time of the hearing and properly took it into account, ultimately determining it was a "non-issue." (T4-11)

Second, Mr. Smith complied with subsection (a)(1)(D) when he certified that "there are no disciplinary proceedings against me in any jurisdiction nor have any disciplinary proceedings been previously imposed against me in any jurisdiction." (Da60) Contrary to UMDNJ's contentions, inclusion on the Ineligible List pursuant to R. 1:20-1(d) is not a present or past disciplinary proceeding.

Pursuant to R. 1:20-1, the Supreme Court exercises disciplinary jurisdiction over attorneys authorized to practice law in New Jersey. It is assisted by District Ethics Committees, District Fee Arbitration Committees, a Disciplinary Review Board and an Office of Attorney Ethics. Although the term "disciplinary proceedings" is not

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[5] See, e.g., Dsb3 ("the trial court erroneously permitted Mr. Smith to hide his New Jersey license from the court with impunity . . ."). Even a casual reading of the transcript of the oral argument and attendant papers reveals that the trial court knew of Mr. Smith's New Jersey licensure.

defined in the rule's Official Glossary, Black's Law Dictionary defines it as proceedings "brought against attorney to secure his or her *censure*, *suspension* or *disbarment* for various acts of unprofessional conduct." (emphasis added) Black's Law Dictionary 464 (6th ed., 1990). Similarly, the "Categories of Discipline" set forth in R. 1:20-15A include disbarment, indeterminate suspension, term of suspension, censure, reprimand and admonition. Attorneys subject to disciplinary proceedings may appeal to this Court, which "is obligated in an attorney disciplinary proceeding . . . to conduct an independent review of the record." *In re Pena*, 164 N.J. 222, 224 (2000); *see also* R. 1:20-16(c).

Placement on the Ineligible List is an automatic administrative function of the Fund and is not a form of discipline, notwithstanding the defendant's contrary assertion. (Dsb13, 14) *See State v. Green*, 274 N.J. Super. 15, 26 (App. Div. 1994) ("As we see it, R.R.'s default in payment of the requisite assessment and his resulting decertification differ from a disciplinary suspension or disbarment"). The Fund is not one of the agencies listed in R. 1:20-1 that assists this Court's exercise of its disciplinary power. The Fund's rendering an attorney "ineligible" to practice does not implicate any of the disciplinary categories enumerated in R. 1:20-15A. *Cf.* R. 1:20-11A (*suspension* for failure to support dependents); R. 1:20-11B (*suspension* for failure to repay student loans). Furthermore, an attorney repaying the Fund "shall be reinstated automatically to the practice of law without further order of the Court. . . ." *Cf.* R. 1:20-1(d). This plainly is not an instance where an attorney's nonpayment to the Fund results in the subsequent unauthorized practice of law, which *would* result in a disciplinary proceeding. *Cf. In re*

Sloboda, 157 N.J. 16, 17 (1999); *In re Fulmer*, 152 N.J. 430 (1998). Because placement on the Ineligible List is not a form of discipline, much less one that results from a "disciplinary proceeding," Mr. Smith's certification as to the absence of such proceedings complied with R. 1:21-2(a)(1)(D).

2. THIS COURT SHOULD GIVE EFFECT TO THE RULE'S PLAIN LANGUAGE IN THE ABSENCE OF COUNTERVAILING EXTRINSIC EVIDENCE.

Even though this Court's affirmance should be on the basis of the plain language disjunctive standard set forth in R. 1:21-2, this conclusion is further bolstered when one takes into account the lack of extrinsic evidence that would evince a contrary intent on the part of the drafters.

The maxim that plain language dictates rule interpretation may be modified only if there is a "*specific indication* of legislative intent to the contrary." (emphasis added.) *See Town of Morristown v. Woman's Club of Morristown*, 124 N.J. 605, 610 (1991), *cited in First Resolution Inv. Corp. v. Seker*, 171 N.J. 502 (2002) (applying a provision of statutory interpretation to court rules). In the context of rule interpretation, this Court determines drafter's intent by looking at a rule's comments or amendments. *See First Resolution Inv. Corp.*, 171 N.J. at 513. Additionally, it may look to an agency's consistent application of the rules. See *State v. Gonzalez*, 114 N.J. 592, 600 (1989).

R. 1:21-2(a) has been amended several times. *See generally* R. 1:21-2, cmt. These revisions have not affected the disjunctive nature of subsection (a)(1) whatsoever.

Although the 1975 revision made explicit that New Jersey-licensed attorneys may be admitted *pro hac vice,* it does not specify that the second portion of the rule is the exclusive method of admittance for such attorneys. R. 1:21-2, cmt. If that was the intention of the drafters, the rule could have been written in such a fashion. But it was not.

Furthermore, this Court should grant no deference to the interpretations of R. 1:21-2 provided either by Stephen W. Townsend, Clerk of this Court, or Kenneth J. Bossong, Fund Director and Counsel, in their certifications to the trial court. To a certain extent, both certifications are unresponsive. Mr. Townsend's certification concerns his inability to take Mr. Smith off the Ineligible List, a remedy that Mr. Smith does not seek. Mr. Bossong's certification fails to recognize the disjunctive language of R. 1:21-2(a)(1).

More importantly, it appears that the Fund's interpretation of R. 1:21-2 was created solely in response to this litigation. Additionally, as explained below, it derogates from this Court's previous Administrative Directives. According to Mr. Bossong's certification, if an attorney admitted *pro hac vice* "sen[t] payment for only the current calendar year despite other years of ineligibility, our office would credit the individual with payment for the current year but would be without authority to reinstate that lawyer[] from the ineligible list until all amounts due are paid in full." (Da86a)

As a general rule, this Court is not bound by an agency's legal interpretation of a statute or court rule, *see, e.g., In re Taylor*, 158 N.J. 644, 660 (1999), (citing *Mayflower Sec. Co. v. Bureau of Sec.*, 64 N.J. 85, 93 (1973)); *see*

also R. 2:10-1, cmt.5. This Court should pay no heed to the agency's interpretation where, as here, the agency tailors its policy in response to litigation. *See, e.g., James v. Board of Tr. of PERS*, 164 N.J. 396, 405 (2000) (ignoring agency's interpretation of statute where interpretation has changed over time).

Notwithstanding the Fund's representation to the trial court that its interpretation is its "policy," it is clear that this policy was developed in response to Mr. Smith's application. First, Mr. Bossong's certification specifies that he "do[es] not recall an instance in which a lawyer already on the ineligible list was admitted *pro hac vice*." (Da86) The certification then sets forth what the Fund would do *if* such an attorney were to be admitted. Second, the Fund's Board of Trustees addressed this issue for the first time *this month*. In its recent Notice to the Bar, the "2003 *Pro Hac Vice* Assessment" provides that:

> Lawyers licensed in New Jersey, who nevertheless seek admission *pro hac vice* for lack of a requirement for private practice such as *bona fide* office, *will have their assessment obligation governed by their status as New Jersey lawyers*. For example, those on the Ineligible List are precluded by Order of the Supreme Court from practicing law in New Jersey.
>
> (emphasis added.)

Board of Trustees, New Jersey Lawyers' Fund for Client Protection, *2003 Pro Hac Vice Assessment: N.J. Lawyers' Fund for Client Protection*, 171 N.J.L.J. 61, 115 (2003).

Prior Notices to the Bar did not contain this language. *Cf., e.g.*, Board of Trustees, New Jersey Lawyers' Fund for Client Protection, *2002 Pro Hac Vice Assessment*, ___

N.J.L.J. ___(2002) (Psa6) If Mr. Bossong's certification truly set forth the Fund's policy vis-à-vis attorneys in Mr. Smith's position, this new notice provision would be unnecessary.

More troubling to this Court should be the Fund's position that it is "without authority" to admit Mr. Smith *pro hac vice*. The fact is, pursuant to the Rules and Administrative Directives, the Fund is without authority to *deny* Mr. Smith's application. First, R. 1:21-2 vests the courts with the discretion to determine a *pro hac vice* application. Other than accepting payment, the rules provide no role for the Fund. Second, Administrative Directives 8-83, 9-87 require attorneys admitted *pro hac vice* to "pay in full at the time of admission *pro hac vice* the full annual fee required of members of the bar of this state. . . ." Directive of the Administrative Office of the Court, 8-83, 9-87 (1987). After the Administrative Conference of the Supreme Court determined at its June 9, 1987 meeting that this application "warranted clarification," Robert D. Lipscher, Administrative Director, issued a directive delineating between attorneys admitted *pro hac vice* prior to February 15, 1984 – who were not required to make any payments to the Fund – and those admitted on or after that date – who were so required. *Id.* The directive concluded, "[i]n sum, a *pro hac vice* attorney is required to make a *maximum of one full payment in any calendar year*. . . ." (emphasis added.) *Id.* These directives are now embodied in the 1992 amendments to R. 1:21-2.

Because administrative directives have the effect of rules, it is the *Fund* that is violating the trial court's order by refusing to allow Mr. Smith to appear *pro hac vice* unless he makes more than the required single annual payment. Just as litigants and attorneys must follow

Administrative Directives and Rules of court, so, too, must judicial agencies. *See, e.g.*, Directive of the Administrative Office of the Courts, 6-74, 15-75 (1975) ("The Rules are applicable to judges as well as lawyers and litigants").

While it is certainly this Court's prerogative to appoint a committee to examine modifying this rule in accordance with the Fund's interpretation or even to issue its own interim rule *sua sponte, see, e.g.*, *State v. Williams*, 93 N.J. 39, 71 (1983); *In re Sackman*, 90 N.J. 521, 528 (1982) *superseded by* R. 1:21-1(a), any application should be prospective. If this Court were to change the rule *sua sponte*, it should create a bright-line rule exempting Mr. Smith or any other similarly situated attorneys admitted *pro hac vice*. *See* Directive of the Administrative Office of the Courts, ##8-83, 9-87 (1987) (differentiating between attorneys admitted prior to February 15, 1984 and those admitted on or after that date).

It should be noted that BU does not challenge the legitimacy of the Fund or its laudable purpose to reimburse victims of the "losses caused by the dishonest conduct of members of the bar of this State." *See* R. 1:28-1(a). In light of its mission, it is understandable that the Fund aggressively pursues every available revenue stream[6] and is unwilling to eliminate or reduce temporarily the annual fee despite having the nation's largest surplus. *See* Robert G. Seidenstein, *Client Protection Fund: Here lies the nation's fattest surplus*, N.J. Lawyer,

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[6] See, e.g., Henry Gottlieb, *Making Thieving Lawyers Pay It Back: Lawyers' Fund crusades for writing client restitution into plea deals, and prosecutors and judges are getting on board*, 158 N.J.L.J. 1 (1999).

Dec. 9, 2002, at 1. BU's position is that such goals, however, cannot excuse the Fund's misinterpretation of this Court's Rules.

C. AFFIRMING THE TRIAL COURT'S ORDER ADMITTING ROBERT SMITH *PRO HAC VICE* SUPPORTS THE POLICY UNDERLYING THE RULE.

Not only does the plain language and drafter's intent support the trial court's order admitting Mr. Smith *pro hac vice*, so, too, do the policies underlying the rule allowing trial courts to admit attorneys *pro hac vice*. "If a . . . rule is ambiguous, courts may ascertain the intent of the drafters by looking to extrinsic sources such as the . . . rule's underlying purpose and history." *First Resolution Inv. Corp. v. Seker*, 171 N.J. 502, 512, 513 (2002). As discussed in Part I of this brief, the history of R. 1:21-2(a) further bolsters the trial court's interpretation. Consequently, the next area for analysis is the Rule's purpose.

The trial court recognized that Mr. Smith's infrequent appearance in New Jersey courts justified his appearance *pro hac vice* within the meaning of the term. *Pro hac vice* means "for this turn; for this one particular occasion." Black's Law Dictionary 1212 (6th ed., 1990). By contrast, a person engages in the "practice of law" by "maintaining an office where he is held out to be an attorney. . . ." Black's Law Dictionary 1172 (6th ed., 1990). Mr. Smith does not wish to engage generally in the practice of law in New Jersey. Rather, he wishes to be heard on this single matter. The defendant's argument and the supporting certification of Mr. Townsend (Da83a) are predicated on the assumption that Mr. Smith desires to resume practicing law in New Jersey.

Furthermore, admitting Mr. Smith *pro hac vice* comports with this Court's goals of orderly administration and control over the attorneys appearing before it. The trial court's order admitting Mr. Smith *pro hac vice* requires him to abide by the New Jersey Court Rules, make annual payment to the Fund for the duration of this matter, consent to the appointment of the Clerk of the Supreme Court for service of process and affiliate with local counsel. (Da78-79.)[7]

Despite the Fund's likely disagreement, requiring Mr. Smith to pay only for the duration of his representation in New Jersey comports with the purpose underlying the Fund. As stated previously, the Fund's purpose is the reimbursement "of losses caused by the dishonest conduct of members of the bar of this State." R. 1:28-1. The Fund only compensates victims of conduct "engaged in while the attorney was a practicing member of the Bar of this State or admitted *Pro Hac Vice* in a matter pending in this State." R. 1:28-3; *see also Abdallah v. Pileggi*, 914 F. Supp. 1115, 1120 (D. N.J. 1996). Accordingly, it is common sense that the Fund should be funded by attorneys actually practicing law in New Jersey. By contrast, since his departure, none of Mr. Smith's clients could make a claim against the Fund because they were not New Jersey

[7] Admitting Mr. Smith for this case also ensures that clients are competently represented. Although placement on the Ineligible List affects Mr. Smith's ability to practice law full-time in New Jersey's courts, it does not affect his character or competency to represent his client. See *Abdallah v. Pileggi*, 914 F. Supp. 1115, 1117 (D. N.J. 1996). As the Appellate Division stated in *State v. Green*, 274 N.J. Super. 15, 26 (App. Div. 1994), "[l]awyers who do not pay their assessments violate a legal norm, but not one established for the protecton of their clients."

litigants. The only client that Mr. Smith has sought to represent, before a New Jersey State Court since 1985, is BU in this litigation. BU is protected in this litigation by Mr. Smith's payment into the Fund pursuant to the trial court's order. It would be punitive for Mr. Smith, who has not practiced whatsoever in New Jersey courts for over 16 years, to pay into the Fund even though there is no chance that his clients, during that time period, could claim.

One alternative would be to create a category of "inactive" attorneys to cover individuals such as Mr. Smith. Though the *pro hac vice* rules of other states cited by the defendant do not support its argument, as discussed in Part II of this brief, Delaware's "inactive" status is illustrative of how other states treat attorneys similarly situated to Mr. Smith. "Inactive" attorneys are required to pay certain assessments annually, but are exempt from assessments applicable to attorneys who practice law in the state, such as the Lawyer's Fund for Client Protection, the Office of Disciplinary Counsel, and the Commission on Mandatory Continuing Legal Education. Del. R. 69. (Psa11) An attorney on inactive status wishing to represent a client in Delaware courts has the opportunity to affiliate with an active member of the Delaware bar, who would then apply for admission *pro hac vice* on behalf of the inactive member. Del. R. 71. (Dsa113). If the inactive attorney wishes to reestablish active status, he or she re-registers as "active" and pays the necessary assessments for that year. The introduction of such a system in New Jersey would bring equity into the mix, as it would force attorneys representing clients in New Jersey to bear the burden for funding the Fund.

II. THE RULES OF OTHER STATES DO NOT COMPEL A DIFFERENT RESULT.

New Jersey's requirement that its licensee attorneys maintain in-state *bona fide* offices or affiliate with local counsel and demonstrate good cause to be admitted *pro hac vice* has engendered significant controversy. And it is safe to say that the defendant is in a distinct minority in characterizing this scheme as "unusually generous" to those licensees who do not maintain *bona fide* offices. (Dsb16) As this Court's *Ad Hoc* Committee on Bar Admissions, chaired by the Honorable John E. Wallace, Jr., J.A.D. ("Wallace Committee"), found when it compared New Jersey's *bona fide* office requirement against twelve other states, New Jersey's requirement is unique in its strictness. In recommending that the requirement be essentially abolished, the Wallace Committee's report made the following observation regarding the *bona fide* office rule:

> 3. The research [of other states], summarized previously, discloses that the rule as currently written does not fall within the mainstream of other states' supervisory schemes. In fact, it is practically unique.

Supreme Court Committee Rule Reports, *Report of the Ad Hoc Committee on Bar Admissions*, 170 N.J.L.J. 1001, 1064 (2002).

Accordingly, the defendant's observation that New Jersey's *pro hac vice* rule is especially generous because "[m]ost states exclude their own licensees," from their definitions of who is eligible for *pro hac vice* admission, (Dsb17), is plainly wrong.

UMDNJ also attempts to engraft an additional requirement upon the *pro hac vice* rule when it argues that R. 1:21-2 requires "that the applicant be in good standing in the jurisdictions where admitted." (Dsb21) The rule, on its face, does not incorporate this requirement. In making this statement, UMDNJ presumably is referring to subsection (c), which actually requires an attorney to certify as to the presence or absence of *disciplinary proceedings*. As previously stated, administrative ineligibility for failure to pay the Fund is not a disciplinary proceeding. Mr. Smith's certification as to the absence of such proceedings accurately described his licensure. (Da60)

It should be noted that the Wallace Committee's report recommends that RPC 5.5 be amended to expressly include the requirement that the defendant argues already exists in R. 1:21-2; namely, that an attorney admitted *pro hac vice* "be licensed and in good standing in all jurisdictions of admission and not be the subject of any pending disciplinary proceedings. . . ." Supreme Court Committee Rule Reports, *Report of the Ad Hoc Committee on Bar Admissions*, 170 N.J.L.J. 1001, 1063 (2002). The absence of such specificity in the existing RPC 5.5 and R. 1:21-2 is indicative of the absence of such a requirement.[8]

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[8] Additionally, and very significant, rule changes have recently been proposed, including changes to the bona fide office rule, admission to the bar on motion and adoption of the ABA's Model Rule on pro hac vice; *see, e.g.*, Supreme Court Committee Rule Reports, *Report of the New Jersey Supreme Court Commission on the Rules of Professional Conduct*, 170 N.J.L.J. at 1045 ("Pollock Commission") (endorsing abolition of in-state bona fide office requirement); Supreme Court Committee Rule Reports, *Report of the Ad Hoc Committee on Bar Admissions*, 170 N.J.L.J. at 1058 (endorsing abolition of in-state bona

(Continued on following page)

While the American Bar Association's Model Rules and the rules of other states may be helpful to interpret New Jersey's rules in instances where they are similar, they are so different here as to be of limited application. Furthermore, while the winds of change may be blowing in New Jersey regarding the *bona fide* office rule, admission to the bar on motion and adoption of the ABA's Model Rule on *pro hac vice*; *see, e.g.*, Supreme Court Committee Rule Reports, *Report of the New Jersey Supreme Court Commission on the Rules of Professional Conduct*, 170 N.J.L.J. 1001, 1045 (2002) ("Pollock Commission") (endorsing abolition of in-state *bona fide* office requirement); Supreme Court Committee Rule Reports, *Report of the Ad Hoc Committee on Bar Admissions*, 170 N.J.L.J. at 1058 (endorsing abolition of in-state *bona fide* office requirement and endorsing admission on motion); (Dsa183a-84a); favorable committee reports are not conclusive indicators. After all, in 1981, the Committee to Evaluate Bar Admission Requirements, chaired by former Justice Nathan L. Jacobs, recommended that New Jersey admit out-of-state attorneys on motion if they had practiced for at least five years in another jurisdiction. *See* Supreme Court Committee Rule Reports, *Report of the Committee to Evaluate Bar Admission Requirements*, 108 N.J.L.J. 269, 291 (1981), (*cited by In re Sackman*, 90 N.J. at 528, n.5). Over two decades later, this topic again promises to be hotly debated. For example, the New Jersey State Bar Association announced the day after the publication of the Pollock

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fide office requirement and endorsing admission on motion). Although these committee reports may be a sign of change, only this Court has the power to implement rules.

Commission and Wallace Committee reports that it would "critically examine" the concept of admission on motion, and noted its "well-defined position in support of the *bona fide* office rule." *See* NJSBA, *NJSBA To Address Pollock Commission and Wallace Commission Reports Following Critical Study*, (Dec. 12, 2002), at http://www.njsba.com/press/press_title_link.cfm?pressid=302. Therefore, while these committee reports may be a sign for needed change, only this Court has the power to implement rules.

The true inquiry for purposes of this appeal is whether the trial court properly admitted Mr. Smith *pro hac vice* under R. 1:21-2 as written. Because it did, this Court should affirm the trial court's order.

III. ADOPTION OF THE DEFENDANT'S INTERPRETATION OF THE *PRO HAC VICE* RULE WOULD VIOLATE MR. SMITH'S CONSTITUTIONAL RIGHTS

If UMDNJ's interpretation of the rule is correct, and Robert Smith is prohibited from appearing in this matter, the rule or order which prohibits his appearance in this matter *pro hac vice* violates the United States Constitution. The Constitution limits the burdens states may impose upon the privileges and immunities of out-of-state residents. States may not discriminate between members of the same class without a legitimate and rational justification, and states may not apply their laws without fair notice or in an arbitrary and capricious manner. The Constitution also restricts the burdens that states may place upon interstate commerce. If Mr. Smith is prohibited from representing his client, BU, in this matter, that prohibition runs afoul of all of these Constitutional rights.

A. A REGULATORY SCHEME UNDER WHICH MR. SMITH IS REQUIRED TO PAY ARREARAGES TO THE FUND DOES NOT HAVE A SUBSTANTIAL RELATIONSHIP TO THE STATE'S OBJECTIVE IN CREATING THE FUND, AND VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE

The Privileges and Immunities Clause of the United States Constitution prohibits a state from imposing requirements that deprive nonresidents of a privilege or immunity, unless there is a substantial reason for the different treatment and the burden placed upon the nonresident bears a substantial relationship to the state's objective. U.S. Const. art. IV, § 2; *Tolchin v. Supreme Court of the State of New Jersey*, 111 F.3d 1099, 1111 (3d Cir. 1997) (citing *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985)). The United States Supreme Court has expressly recognized that "the right to practice law is protected by the Privileges and Immunities Clause." *Piper*, 470 U.S at 283. Therefore, to discriminate against nonresident attorneys who seek to practice law in this State, there must be a substantial reason for the difference in treatment *and* the discrimination against nonresidents must bear a substantial relationship to the State's objective. *Id.* at 284. Here, there is no substantial reason for treating Mr. Smith differently from other out-of-state attorneys who seek *pro hac vice* admission in New Jersey. And, moreover, there is no substantial relationship between the State's objective in creating the Fund – to protect litigants from their attorneys' dishonesty – and forcing Mr. Smith to pay 16 years of arrearages for the time he has practiced outside of New Jersey.

Mr. Smith is not an in-state attorney. He neither resides nor practices in the State of New Jersey, nor has he done so for the last 16 years. If Mr. Smith practiced in New Jersey, he would be required to make the requisite payments into the Fund as part of his participation in an overall scheme designed to protect clients from dishonest attorneys. R. 1:28-2(a). If he practiced in New Jersey, Mr. Smith's clients would be able to seek reimbursement from the Fund should any of his conduct be deemed dishonest. However, Mr. Smith is not a New Jersey attorney. He is an out-of-state attorney who both resides and practices in the Commonwealth of Massachusetts. As an out-of-state attorney seeking *pro hac vice* admission to practice before the courts of New Jersey, R. 1:21-2(a) states that Mr. Smith must pay into the Fund during the time in which he is admitted *pro hac vice*.

Despite the plain language of the rule that addresses out-of-state attorneys, defendant insists that Mr. Smith must be treated differently. UMDNJ demands that Mr. Smith pay arrearages into the Fund for the entire time period during which he was neither an in-state attorney nor an out-of-state attorney admitted *pro hac vice*. There is no rational justification for such differential treatment. Unlike the payments made by both in-state and attorneys admitted *pro hac vice*, Mr. Smith's contributions would not be part of a scheme designed to protect his clients. This unique burden upon Mr. Smith is a direct violation of his fundamental right to practice law. In order to so burden Mr. Smith's rights, there must be a substantial reason for the burden *and* the burden must be substantially related to the achievement of the State's objective. *Tolchin*, 111 F.3d at 1111. Given the facts of this case, it is clear that no such relationship exists.

In *Piper*, the Supreme Court rejected the reasons offered by the State of New Hampshire for its refusal to admit nonresident attorneys to the state bar. 470 U.S. at 284. The reasons offered by New Hampshire included the state's interest in an attorney's familiarity to the rules and procedures, ethical behavior, availability to attend court proceedings and *pro bono* and volunteer work in the state. *Id.* at 285. Noting that each state objective had merit, the Supreme Court held that "none of these reasons meets the test of 'substantiality,' and that the means chosen do not bear the necessary relationship to the State's objectives." *Id.*[9]

If R. 1:21-2 is interpreted, as defendant suggests, to impose a burden upon the fundamental right of practicing law in New Jersey, the State's reason must be substantial. The objective of the Fund is to reimburse clients for "losses caused by the dishonest conduct" of their attorneys. R. 1:28-1(a); *see also* R. 1:28-3(a). The Fund reimburses New Jersey litigants who are harmed by their New Jersey attorneys. This salutary goal is the extent of the Fund's stated objective, but it does not satisfy the "substantial reason" test.

Although the Fund implicitly relates to attorney ethics in the respect that it reimburses clients harmed by

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[9] Other reasons that did not meet the substantiality test include the delays in publication of laws will prevent nonresidents from maintaining an adequate level of competency, the burden upon court schedules in accommodating nonresidents, and the inability to adequately supervise a nationwide bar membership. *Barnard v. Thorstenn*, 489 U.S. 546, 553 (1989). None of these reasons rose to the level of a substantial objective or bore a substantial relationship to that objective. *Id.* at 554.

miscreant attorneys, the Fund itself does not promote ethical behavior. The Supreme Court of the United States has held that monitoring attorney's ethical conduct is not a substantial objective sufficient to place limits upon a fundamental right. *Barnard v. Thornstenn*, 489 U.S. 546, 553 (1989); *Piper*, 470 U.S. at 285. Furthermore, the Appellate Division has held that failure to pay into the Fund does not implicate an attorney's honesty or his fitness to practice law. *State v. Green*, 274 N.J. Super. 15, 26 (App. Div. 1994). The Fund's implicit loftier goals of promoting attorney ethics do does not rise to the level of a substantial objective necessary to restrict Mr. Smith's fundamental right to practice law.

It is notable that the State's current attempts to disqualify Mr. Smith from *pro hac vice* admittance are counterintuitive to the goal of achieving competent representation for New Jersey litigants. There is no question that Mr. Smith is uniquely qualified to represent BU in this matter. As BU's Associate General Counsel, Mr. Smith has a close relationship with his client. The Fund's purpose is fulfilled upon Mr. Smith's payment for the period he is admitted *pro hac vice*, which would protect the litigant he seeks to represent in this matter. The State's actions to disqualify Mr. Smith may actually disadvantage BU by limiting BU's choice of competent counsel and by causing it to incur significant counsel fees needlessly. *See Hauck v. Danclar*, 262 N.J. Super. 225, 228 (Sup. Ct. 1993) ("A client is always entitled to be represented by counsel of his choosing.").

Moreover, there is no substantial relationship between the Fund's objective and the burden imposed. When an out-of-state attorney is admitted to practice in New Jersey *pro hac vice*, he or she is required to pay into the Fund

only during the time in which he or she is admitted in that case. R. 1:21-2(a). This requirement ensures that the New Jersey litigant receives the protection of the Fund. Logically, therefore, an out-of-state attorney should not be compelled to pay into the Fund during the time he or she *is not admitted pro hac vice* because the out-of-state attorney does not undertake representation for which his clients could benefit from the Fund's protection.

Consequently, requiring Mr. Smith to pay fees during the time in which he did not reside or practice in New Jersey creates a burden depriving him of his fundamental right to practice law without a correlative State purpose. Mr. Smith is an out-of-state attorney. He is a resident of Massachusetts, practices law in Massachusetts, and has applied to be admitted *pro hac vice* to represent his employer, a non-profit university, in a single matter in New Jersey. He has neither resided nor practiced in New Jersey for more than 16 years, nor does he have any intention of residing or practicing full-time in New Jersey in the future.

There is no difference between Mr. Smith and any other out-of-state attorney seeking *pro hac vice* admission in New Jersey – except that he received a license to practice law in New Jersey several years ago when he lived and worked in this area. The defendant insists that because Mr. Smith once held a plenary license to practice law in New Jersey, he must be viewed in the same way that in-state New Jersey attorneys are viewed, and that he must pay into the Fund as an attorney who practices in New Jersey. However, defendant's argument does nothing to create a substantial relationship where none exists. As previously stated, the expressed purpose for the Fund is to protect New Jersey litigants from dishonest attorneys

practicing before New Jersey courts. The Fund's *raison d'etre* is not met by requiring payment from an individual, who, for the past 16 years has not resided in nor practiced law in New Jersey, and where his client is an out-of-state institution that could not benefit from the Fund's protection.

Forcing Mr. Smith to pay fees, for the time during which he did not practice in New Jersey, does not relate, substantially or otherwise, to the State's objective, unless that objective is purely economic.[10] Less restrictive alternatives are available to protect the State's interests. For instance, the State can insist, as it does for all other out-of-state attorneys, that Mr. Smith pay into the Fund during the time in which he is admitted to practice *pro hac vice*. Because the State does not have a substantial reason for uniquely burdening Mr. Smith and there is no substantial relationship between the State's reason and the imposed burden, the State's insistence that a former in-state attorney pay fees to the Fund for those years in which the attorney was, and continues to be, an out-of-state attorney violates the Privileges and Immunities Clause.

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[10] If the objective of the Fund is purely economic, then the collection of arrearages is unnecessary given the current surplus. Robert G. Seidenstein, *Client Protection Fund: Here lies the nation's fattest surplus*, N.J. Lawyer, Dec. 9, 2002, at 1.

B. TREATING MR. SMITH DIFFERENTLY FROM OTHER OUT-OF-STATE ATTORNEYS SEEKING TO BE ADMITTED *PRO HAC VICE* VIOLATES EQUAL PROTECTION BECAUSE IT HAS NO RATIONAL BASIS AND BEARS NO RELATIONSHIP TO THE STATE'S PURPOSE

In addition to violating the Privileges and Immunities clause of the Constitution, defendant's interpretation of the *pro hac vice* rule and how it applies to Mr. Smith, violates the Equal Protection clause of the Fourteenth Amendment to the United States Constitution. The Equal Protection clause is violated by state rules that on their face or by application differentiate between individuals who are otherwise similarly situated. U.S. Const. amend. XIV, § 1; *Tolchin*, 111 F.3d at 1113. Rational basis scrutiny is used to review legislation where the affected class is not a discrete and insular minority. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *Schumacher v. Nix*, 965 F.2d 1262, 1269 (3d Cir. 1992).

Pursuant to a rational basis review, as required by the Supreme Court, legislation has a presumption of legitimacy, but this presumption may be challenged and overcome. "'A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Laws that cannot meet this minimum rationality requirement are constitutionally infirm." *Schumacher*, 965 F.2d at 1269; *see also Tolchin*, 111 F.3d at 1114. Furthermore, even laws that may be facially constitutional may be unconstitutional as applied. *Schumacher*, 965 F.2d at 1271.

On its face, R. 1:21-2(a) treats all out-of-state attorneys equally – it requires all out-of-state attorneys admitted *pro hac vice* to pay into the Fund only during the time that the attorney is admitted *pro hac vice*. This requirement is consistent with the State's objective of reimbursing clients for the dishonest conduct of lawyers, such that if out-of-state attorneys conduct themselves in such a way as to cause injury to their clients for the period of time that they practice in New Jersey, then those clients are entitled to be compensated from the Fund.

However, UMDNJ seeks an application of R. 1:21-2 that would create a sub-class of out-of-state attorneys who would be required to shoulder a unique burden. The new classification separates out-of-state attorneys who once practiced in New Jersey from all other out-of-state attorneys. Defendant seeks to require this new class, of which Mr. Smith would be included, to pay fees into the Fund throughout the duration of their career even if they left the State years ago to practice law elsewhere, with no intention of ever returning to New Jersey to practice law. There is no rational basis for the creation of this class. Like other out-of-state attorneys, attorneys in this subclass cannot practice before the courts of this State without *pro hac vice* admission. But, unlike other out-of-state attorneys, the defendant demands that these former New Jersey attorneys pay into the Fund during periods in which they could not practice in New Jersey and did not have clients who could benefit from the Fund's protection. There is no reasonable justification for creating such a subclass of out-of-state attorneys and treating them differently.

Mr. Smith is an out-of-state attorney seeking *pro hac vice* admission in New Jersey for the purpose of representing BU, his employer and his client, in a single matter

before the New Jersey courts. Defendant would have this Court overrule the trial court and treat Mr. Smith in a different manner than other out-of-state attorneys seeking *pro hac vice* admission in New Jersey, simply due to the fact that he once held a plenary license to practice law in New Jersey. Such a holding is unreasonable and without any legitimate justification, and therefore violates the Equal Protection Clause.

Moreover, even if this Court concludes that there is a reasonable basis for treating Mr. Smith differently from other out-of-state attorneys, the proffered reason must be rationally related to the State's goal of requiring payment into the Fund, which is to protect parties from incompetent and dishonest attorneys. *See Schumacher*, 965 F.2d at 1271 (holding that a classification must be constitutional as applied). As noted in the previous section, Mr. Smith's client for the past 11 years, BU, could not benefit from the Fund's resources because it was not a New Jersey litigant during that time period. The only client that Mr. Smith is now seeking to represent before a New Jersey State Court is BU, and BU is protected by Mr. Smith's payment into the Fund during the period of this litigation. Any additional requirement that Mr. Smith pay fees for the 16 years in which he did not practice in New Jersey is completely unrelated to Mr. Smith's competence or the protection of Mr. Smith's clients and, therefore, has no relationship to the stated objective of the Fund. R. 1:28-1.

The defendant's interpretation of the rule has no reasonable objective or rational relationship to the burden it imposes upon Mr. Smith. The Equal Protection Clause is violated as the State seeks to apply it, by requiring Mr. Smith to pay fees for those years in which he was an out-of-state attorney because other out-of-state attorneys are

not required to pay similar fees in order to be admitted *pro hac vice*. The sub-classification of out-of-state attorneys who once practiced in New Jersey, which would be the inevitable result if defendant's position is adopted, has no rational basis because it is not related to the rule's stated purpose of protecting the clients from their attorneys' misconduct during the time the attorney practices before New Jersey courts. Furthermore, the unique burden levied upon Mr. Smith bears no relationship to the State's goal of protecting litigants from their attorneys, because Mr. Smith's clients could not receive the protection of the Fund during the past 16 years when he practiced out-of-state.

C. IN THE INTERESTS OF DUE PROCESS, ANY DECISION THAT SEEKS TO CLARIFY THE RULES AND THAT ADVERSELY IMPACTS MR. SMITH'S RIGHTS SHOULD ONLY BE APPLIED PROSPECTIVELY.

The interpretation of the *pro hac vice* rule offered by the defendant violates yet another staple of our Constitution. Procedural Due Process requires that the laws affecting the rights of citizens be clear in their purpose and application. U.S. Const. amend. XIV, § 1. Laws that are vague or without standards violate Due Process. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Citizens must have fair notice of how laws affecting their rights will be applied. *Morales*, 527 U.S. at 58; *Smith v. Goguen*, 415 U.S. 566, 572 (1974).

An attorney's law license is a property interest entitled to the procedural safeguards of Due Process. *Casella v. Pennsylvania Interest on Lawyers Trust Account Bd.*, 47 Fed. Appx. 193, 195 (3d Cir. 2002). The practice of law has

also been held to be a fundamental right protected by the Privileges and Immunities Clause of the Constitution. *Piper*, 470 U.S. at 283. Any application of the New Jersey Practice Rules must conform to the requirements of Due Process, so that Mr. Smith must have fair notice before a rule can be enforced in a manner limiting his rights and interests. *See Morales*, 527 U.S. at 58 (recognizing that due process requires fair notice of the application of law).

Defendant's interpretation of R. 1:21-2 deprives Mr. Smith of his right to practice law in the State of New Jersey, unless he pays the demanded price. Defendant's interpretation is not set forth in the language of the R. 1:21 or in the comments that follow. Defendant's interpretation cannot be permitted to apply to Mr. Smith without prior fair notice that, by leaving New Jersey practice, Mr. Smith would not be permitted *pro hac vice* admission like any other out-of-state attorney, unless he continued paying into the Fund as though he was an in-state attorney.

The fair notice aspect of Due Process protection is in accord with the practice of New Jersey courts applying decisions prospectively. New Jersey courts will apply decisions prospectively where a decision decides an issue of first impression or clarifies a vague law. R. 1:36-3, cmt.; *Montells v. Haynes*, 133 N.J. 282, 295 (1993). The Court should also apply a decision prospectively upon considerations of fairness and equity. *Montells*, 133 N.J. at 297; *Coons v. American Honda Motor Co., Inc.*, 96 N.J. 419, 430 (1984).

Research has uncovered no cases in New Jersey or elsewhere where the *pro hac vice* admission of a former in-state attorney based upon his current status as an out-of-state attorney was challenged solely on economic grounds, i.e. payment into the Fund rather than competence. In

contrast, the United States District Court for the District of New Jersey held that failure to pay into the Fund is not a hindrance to *pro hac vice* admission. *Abdallah v. Pileggi*, 914 F. Supp. 1115 (D. N.J. 1996).

In reliance upon the explicit wording of R. 1:21-2 and available authority, Mr. Smith had no notice that his interests could be burdened in the manner sought by the State. Accordingly, as a case of first impression, any opinion that adversely affects Mr. Smith's rights should be applied prospectively. Furthermore, if this Court interprets the disjunctive "or" in R. 1:21-2(a) as conjunctive, it must also conclude that the Rule is ambiguous, or at least vague. The fair notice requirement of Due Process requires that any decision clarifying the rule that adversely impacts Mr. Smith's rights should only be applied prospectively.

D. DEFENDANT UMDNJ's INTERPRETATION OF THE RULE PLACES AN UNDUE BURDEN UPON INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE

In addition to the other constitutional issues that are directly implicated by UMDNJ's interpretation of R. 1:21-2(a), their interpretation also violates the Commerce Clause. The Commerce Clause of the Constitution prohibits the states from placing an undue burden on interstate commerce. U.S. Const. art. I, § 8, cl. 3. A law may generally be struck down if it directly regulates interstate commerce or imposes a burden on out-of-state interests in favor of in-state economic interests. *Brown-Forman Distillers Corp. v. New York Liquor Auth.*, 476 U.S. 573, 579 (1986). When the burden only indirectly impacts interstate commerce, then the Court must determine whether there is a

legitimate relationship between the imposed burden and the benefit that a state will receive by enforcing the law in the suggested manner. *Id.* Under either test, the burden that the State seeks to impose upon Mr. Smith must be struck down as an undue burden on interstate commerce.

The payment into the Fund by out-of-state attorneys is a direct burden upon interstate commerce. As generally applied, however, there is a corresponding benefit to out-of-state attorneys representing litigants in New Jersey because their clients receive the protection of the Fund for the years in which the matter is pending in New Jersey. The payment by out-of-state attorneys is also limited in duration to the time during which they are admitted *pro hac vice*. The State's interpretation of the rules as they apply to Mr. Smith discriminates against out-of-state attorneys who previously practiced in New Jersey as a member of the New Jersey bar. Yet the only reason for the State to insist upon Mr. Smith's payment of arrearages is to create a direct economic benefit to the State. The rule must not be applied in such a manner as to directly burden interstate commerce in this manner.

Even if one considers the State's application of the rules to Mr. Smith as an indirect regulation of interstate commerce, the defendant's interpretation must fail. There is no question that forcing Mr. Smith to pay 16 years of arrearages to the Fund in order to be admitted *pro hac vice* places a substantial financial burden on Mr. Smith. Moreover, the expressed purpose of the Fund is to protect New Jersey litigants from their incompetent or dishonest attorneys. R. 1:28-1(a). Requiring that attorneys admitted *pro hac vice* pay into the Fund during the time that they practice in New Jersey, satisfies the purpose behind the creation of the Fund. R. 1:21-2(a). By contrast, the purpose

of the Fund is not satisfied by requiring every attorney ever admitted to practice in New Jersey to pay into the Fund for the duration of that attorney's legal career, even well after he or she has left the State to practice on a full-time basis in another jurisdiction.

If Mr. Smith had never practiced in New Jersey, he would only be required to pay the fees for those years in which he was admitted *pro hac vice*. The State's demand that Mr. Smith pay fees to the Fund for the time when he did not practice in New Jersey creates an impermissible economic burden upon attorneys who move out-of-state in favor of attorneys who continue to practice in-state. The State seeks to burden Mr. Smith and use the fees he would be required to pay to protect the clients of in-state attorneys; yet it does not afford Mr. Smith's clients the same protection. Thus, there is no relationship between the State's stated goals and the burden imposed upon Mr. Smith, and this requirement as advanced by UMDNJ, is in direct violation of the Commerce Clause.

CONCLUSION

For the foregoing reasons, the trial court's order admitting Mr. Smith *pro hac vice* and requiring Mr. Smith to pay into the Fund for only the time that he is admitted *pro hac vice,* should be affirmed.

Respectfully Submitted,

ROBERTSON, FREILICH,
BRUNO & COHEN, LLC
ATTORNEYS FOR PLAINTIFF-
RESPONDENT
BOSTON UNIVERSITY

By: /s/ Gary N. Donner
Gary N. Donner, Esq.

Dated: January 24, 2003

PLAINTIFF-RESPONDENT'S SUPPLEMENTAL APPENDIX

SUPREME COURT OF NEW JERSEY

Docket No. 53-601

BOSTON UNIVERSITY Plaintiff-Respondent, v. UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, Defendant/Third-Party Plaintiff-Appellant. v. ALTEC, INC., Third-Party Defendant.	CIVIL ACTION **ON DIRECT CERTIFICATION TO THE SUPREME COURT OF NEW JERSEY FROM:** SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. Sat Below: Honorable Stephen J. Bernstein, J.S.C.

CERTIFICATION OF IRVIN M. FREILICH

I, Irvin M. Freilich, hereby certify as follows:

1. I am a member of the law firm of Robertson, Freilich, Bruno & Cohen, LLC, attorneys for Plaintiff-Respondent Boston University.

2. I make this certification to respond to certain statements made by Defendant/Third-Party Plaintiff-Appellant University of Medicine and Dentistry of New Jersey, ("UMDNJ") in its briefs on appeal. UMDNJ repeatedly asserts that Mr. Smith attempted to mislead the trial court by failing to include in his initial certification a

statement that he was a member of the bar of the State of New Jersey. This is simply not true.

3. The first case management conference in this matter was scheduled before the trial court on May 24, 2002. (Psa4) The conference was supposed to be a teleconference to be set up by the Court. A day before the conference we were informed that the conference was going to be held in person at the request of Rhonda S. Farber, Deputy Attorney General. (Psa5) I specifically recall talking to Ms. Farber on May 23, 2002 to find out why she had changed the format of the conference without obtaining our consent in advance.

4. During that conversation, I explained to her that Robert Smith, Boston University's Associate General Counsel, was planning to participate in the conference call with the Court, but that at the eleventh hour, there was no way that he could be present in person for the May 24, 2002 conference. I specifically recall Ms. Farber's reaction to this statement – namely, that as an in-house attorney, it was inappropriate for Mr. Smith to participate in the conference.

5. In response to her comments, I explained that Mr. Smith was a trial attorney who has tried many cases on behalf of his employer, Boston University, and that it was BU's intention to move for his admission *pro hac vice* in this matter. I also informed Ms. Farber during that same conversation that Mr. Smith had once practiced law in New Jersey.

6. Thus, it was no surprise to Ms. Farber that Mr. Smith had once been admitted in New Jersey. Moreover, it is readily apparent from the transcript of the motion before Judge Bernstein that the court was fully aware of

Mr. Smith's status as an attorney who had been admitted to practice in New Jersey.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Irvin M. Freilich
IRVIN M. FREILICH

Dated: January 24, 2003

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Deputy Attorney General
Division of Law, 5th Floor
124 Halsey Street
P.O. Box 45029
Newark, New Jersey 07101

BOSTON UNIVERSITY, Plaintiff v. UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, Defendant	SUPERIOR COURT OF NEW JERSEY DOCKET NO. L 7302-01 CIVIL ACTION ORDER OF TRACK ASSIGNMENT AND CASE MANAGEMENT [Filed May 10, 2002]

This matter having been opened to the Court on motion of the defendant, University of Medicine and

Dentistry of New Jersey, Attorney General David Samson appearing by Deputy Attorney General Rhonda Farber, and on notice to Gary N. Donner, Esq., representing the plaintiff, for an Order reassigning this matter to a Track IV designation and for Case Management, and the Court having read the supporting documents and heard the arguments of counsel and it appearing that exceptional circumstances exist which justify granting the relief requested, specifically the complex relationships, communications and understandings between and among the parties herein; it is therefore on this 19th day of April 2002,

[Paragraph deleted by Judge and marked Denied.*]

ORDERED that a true copy of this order be served on all counsel within five days of its receipt by the movant.

/s/ Stephen J. Bernstein, J.S.C.
Stephen J. Bernstein, J.S.C.
Stephen J. Bernstein,
J.S.C.

---

* [w/out prejudice. CMC is hereby scheduled for May 24, 2002 at 3:00 pm by Teleconference to be set up by the court.]

[SEAL]
State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
124 HALSEY STREET
PO BOX 45029
NEWARK, NJ 07101
E-Mail: farberho@law.dol.lps.state.nj.us
(973) 648-3808

[Names Omitted In Printing]

May 20, 2002

HON. STEPHEN J. BERNSTEIN
SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY COURTS BLDG.
Chamber 816
50 W. Market Street
Newark, New Jersey 07102

Re: Boston University vs. University of Medicine and Dentistry of New Jersey

Dear Judge Bernstein:

This letter will confirm my conversation with your law clerk today where I requested that the Case Management Conference scheduled for 3PM Friday May 24, 2002 be held on the record and I asked to be present in your courtroom for the Conference.

I left a message for Mr. Donner advising him that I would be present on Friday. I will fax him a copy of this letter as well.

Respectfully,

DAVID SAMSON
ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Rho[illegible]a Farber
Rho[illegible]a S. Farber
Deputy Attorney General

bb
c: Gary Donner, Esq.

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FOREWORD

Under New Jersey's Constitution, the Supreme Court is charged with making "rules governing the administration of all courts in the State and, subject to the law, the practice and procedures in all such courts." *N.J.S.A. Const.* (1947), Art. 7, § 2, ¶ 3. As administrative head of the courts, the Chief Justice has both the right and the responsibility to implement the policies of the Supreme Court either directly, or by delegating such authority to the Administrative Director. (*See rule* 1:33-3.)

Directives represent one method of exercising the constitutional powers bestowed on the Court and the Chief Justice. Until repealed, changed or superseded by subsequent directive, court rule, or Supreme Court opinion, they are binding statements on policies, practices, and procedures and should be followed.

Like its predecessors, this revision is meant to help judges, other court personnel, and attorneys follow the mandates contained in the directives by bringing all viable directives and memoranda with the force of directives together in one document. And, also like its predecessors, the revision undoubtedly contains errors, omissions, and

room for improvement. I ask that users help us by reporting oversights and making suggestions.

Deborah T. Poritz

Chief Justice

Local Practice Rules

Directive #6-74	December 10, 1974
Directive #15-75	March 29, 1976
Issued by:	Chief Justice Richard J. Hughes

Complaints have been received from attorneys about local practice rules being promulgated by Assignment Judges in some of the vicinages. In some cases "Notice to the Bar" pronouncements have appeared in the *New Jersey Law Journal*, and special directions, procedures, and requirements for the handling of motions and orders in particular counties have been set forth in the NJLJ or by memoranda to counsel – all outside the provisions of the Rules Governing the Courts of the State of New Jersey.

The Rules Governing the Courts of the State of New Jersey were adopted by the Supreme Court pursuant to Article VI, Section II, Paragraph 3 of the New Jersey Constitution, the first sentence of which provides:

> The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts.

The Rules are applicable to judges as well as lawyers and litigants, and this includes Assignment Judges. There are appropriate areas, where the Rules are silent, for

Assignment Judges to accommodate local conditions. Relaxation in specific cases to avoid injustice is provided for by *R.* 1:1-2. Local rules of general applicability, however, contrary to specific provisions of the Rules Governing the Courts are prohibited.

To preclude further complaints, requests for approval of local rules should be submitted to the Supreme Court, through the Administrative Director, prior to any promulgation thereof. Meritorious suggestions to improve procedures are always welcome and should likewise be similarly submitted for consideration.

Under a unified judicial system there is no reason for attorneys to be faced with perplexing local procedures not contemplated by the Rules governing the Courts of New Jersey. Assignment Judges will bring this memorandum to the attention of all judges in their vicinages and see that the provisions hereof are strictly followed.

EDITOR=S [sic] **NOTE**

These directives have been combined, deleting all repetitive paragraphs. Only the first paragraph of #6-74 has been retained and only the first paragraph of #15-75 has been deleted.

The Supreme Court has carved one exception to the prohibition against "local rules." On January 2, 1981 the Supreme Court entered an Order, pursuant to the Speedy Trial program, permitting the suspension of the time periods embodied in the Rules and in *R.* 3:28, Guideline 6, to permit the adoption of local speedy trial programs and "local rules" to be developed by county Criminal Delay Reduction Planning Committees. Thereafter the Supreme

Court approved each plan. Each county's plan is on file with its County Clerk.

No other local rules have been authorized.

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11. Payments to the New Jersey Lawyers Fund for Client Protection

Directive #8-83	January 27, 1984
Directive #9-87	October 20, 1987
Issued by:	Robert D. Lipscher Administrative Director

The Supreme Court has recently amended *R.* 1:21-2(a) to provide that "no attorney shall be admitted under this rule without complying with *R.* 1:20-1(b) and *R.* 1:28-2." These rules require that an attorney pay in full at the time of admission *pro hac vice* the full annual fee required of members of the bar of this state to be paid to both the Ethics Financial Committee and the New Jersey Lawyers Fund for Client Protection.

Such payment shall be required only once per calendar year regardless of the number of times that the attorney is subsequently admitted to speak *pro hac vice* in this state.

This obligation will be discharged by rendering payment to the New Jersey Lawyers Fund for Client Protection at the following address:

Richard J. Hughes Justice Complex
CN961
Trenton, NJ 08625

No independent notice to the Administrative Office of the Courts is necessary since the Fund will henceforth maintain a list of all attorneys admitted *pro hac vice*.

Application:

At its June 9, 1987 Administrative Conference of the Supreme Court considered the application of Rule 1:21-2 and determined that it warranted clarification. The Court thus reached the following conclusions:

> attorneys admitted *pro hac vice* prior to February 15, 1984 in a matter still pending after that date are not required to make any payment to the Committee or Fund in connection with the matter for which they were admitted regardless of how long the case continues.
>
> an attorney admitted *pro hac vice* on or after February 15, 1984 is required to make payment to the Committee and Fund at the time of admission and to continue to make the required annual payments to the committee and Fund for each year in which that case remains open; no additional payments is [sic] required in the same year for any additional case or cases.

In sum, a *pro hac vice* attorney is required to make a maximum of one full payment in any calendar year, if the only cases in which the *pro hac vice* attorney is admitted are continued cases, the annual payment (one full payment) would still need to be made.

EDITOR'S NOTE

These two directives, #8-83 and #9-87, dealing with *pro hac vice* admissions have been combined. All redundant material has been deleted. The fee structure for calendar year 1984 has also been deleted. Since the fees are subject to annual change, a fee schedule is not included.

Whenever "Clients Security Fund" appeared, it has been replaced with the title adopted in 1990, "The New Jersey Lawyers for Fund Client Protection." This directive may now be considered as embodied in the 1992 amendments to *R.* 1:21-2.

In 1997, the "CN" in the address for the AOC was changed to "P.O. Box."

NOTICE TO THE BAR

2002 *PRO HAC VICE* ASSESSMENT

R. 1:21-2 requires those admitted *pro hac vice* to pay the annual assessment.

The Supreme Court of New Jersey having ruled on the Disciplinary Oversight Committee ("DOC") and New Jersey Lawyers Assistance Program ("NJLAP") budgets for 2002, the New Jersey Lawyers' Fund for Client Protection ("Fund") is now in a position to collect the assessment for ***pro hac vice*** admission for calendar year 2002. As always, the money collected through the assessment will support not only the Fund, but the disciplinary process as well. Funding will also be provided for the NJLAP. The breakdown for 2002 is as follows:

Calendar Year of First Admission	DOC Portion	FUND Portion	NJLAP Portion	TOTAL Assess-ment
2002	$ 0.00	$0.00	$0.00	No Fee
2001	25.00	0.00	3.00	$28.00
1999-2000	115.00	25.00	5.00	145.00
1953-1998	115.00	50.00	5.00	170.00
1952 & Prior	0.00	0.00	0.00	No Fee

The operative year of admission is that of the jurisdiction in which the *pro hac* admittee was first licensed.

Board of Trustees
New Jersey Lawyers' Fund
for Client Protection

RULES OF THE SUPREME COURT OF THE STATE OF DELAWARE
PART V. ATTORNEYS
SUBPART C. OTHER PROVISIONS

Del. Sup. Ct. R. **69** (2002)

♦ *Review court orders which may amend this rule.*

Rule **69**. Categories of Bar membership and annual registration

(a) Categories of Membership. – There shall be four categories of members of the Bar of this Court: (i) active, (ii) inactive, (iii) judicial, and (iv) retired.

(b) Registration and Assessments.

(i) Statement. – Active and inactive members shall, as a condition of membership, no later than February 1 of each year, file with the Clerk of the Court of this Court, in a form approved by the Court, a registration statement showing the member's name, residence address, office address, office telephone number, firm association, public office held (if any), and such other information as the Court shall direct.

(ii) Active Assessment. – Active members shall pay a registration assessment of $10 and shall pay such assessments as shall be made pursuant to Supreme Court Rule 66(e)(i), Supreme Court Rule 64(g) and Delaware Rules for Mandatory Continuing Legal Education Rule 3(C)(3)(a).

(iii) Inactive Assessment. – Inactive members shall pay an annual registration assessment of $10 and an annual application assessment of $65 but shall pay no other assessments.

(iv) Failure to Register on Time. – Any active or inactive lawyer, or a Delaware lawyer employed as a Justice of the Peace, Court Commissioner or Master on a full-time basis who fails to file an Annual Registration Statement by February 1 of each year shall pay a $50.00 late filing assessment.

(c) Active Members. – All members of the Bar who are not inactive, retired or judicial members are active members.

(d) Inactive Members.

(i) Application. – A member of the Bar who is not engaged in the practice of law in Delaware or who limits that member's practice of law in Delaware to uncompensated services to clients of one or more of Delaware Volunteer Legal Services, Inc., Community Legal Aid Society, Inc.,

Delaware Council on Crime and Justice, Inc., Office of Child Advocate, the Office of the Public Defender, and the Department of Justice may, upon application to the Clerk of the Court, become an inactive member. Upon compliance with paragraph (b)(ii) of this Rule and Rule 4(C)(3) of the Delaware Rules for Mandatory Continuing Legal Education, an inactive member may become an active member.

(ii) Assessment Exemption. – Whenever a member is classified as inactive, the Clerk of the Court shall notify the Lawyers' Fund for Client Protection, the Office of Disciplinary Counsel, and the Commission on Mandatory Continuing Legal Education and that member shall be exempt automatically from the assessments described in Rule 64(g), Rule 66(e)(i) and Delaware Rules for Mandatory Continuing Legal Education Rule 3(C)(3)(a).

(iii) Inactive Card. – The term certificate of exemption as used in the Delaware Rules for Mandatory Continuing Legal Education Rule 4(C) shall mean a certificate of inactive status and a registration card certifying inactive status.

(e) Judicial Members. – Judicial members are those judges, commissioners, and masters who are disqualified from the practice of law and those retired judges who do not practice law.

(f) Retired Members.

(i) Limitations and Duties. – A member of the Bar who is not engaged in the practice of law in Delaware may, upon application to the Clerk of the Court, be granted a certificate of retirement and, so long as the member does not practice law in Delaware other than as provided herein,

shall not thereafter be required to comply with this Rule. A retired member may not become an active or inactive member without (1) demonstrating, to the Court's satisfaction, the moral qualifications, competency and learning in the law required for admission to practice and (2) compliance with subsection b of this Rule. The Court may refer any retired member seeking to resume active status to the Board of Bar Examiners for determination of suitability to resume active status. Retired members may engage in uncompensated services to clients of one or more of Delaware Volunteer Legal Services, Inc., Community Legal Aid Society, Inc., Delaware Council on Crime and Justice, Inc., the Office of the Public Defender, Office of the Child Advocate, and the Department of Justice.

(ii) Exemption From Assessment. – Whenever a certificate of retirement is issued, the Clerk of the Court shall notify the Lawyers' Fund for Client Protection, the Office of Disciplinary Counsel, and the Commission on Mandatory Continuing Legal Education. A retired member shall be exempt from the assessments set forth in Rule 64(g), Rule 66(e)(i) and Delaware Rules for Mandatory Continuing Legal Education Rule 4(C).

(g) Continuing Obligation to Notify the Clerk of the Court of Changes. – Each active and inactive member of the Bar is required to notify the Clerk of the Court in writing within 30 days of any change in the information provided in the member's most recent registration statement.

(h) Certain Duties of the Clerk of the Court. – The Clerk of the Court shall: (i) deposit forthwith all assessments received in a special account maintained, regulated and audited by the State for that purpose; (ii) mail to each

member of the Bar who files a registration statement and pays the assessments, a registration card, in a form approved by the Court, certifying that such member is in good standing either as an active or inactive member of the Bar, (iii) distribute funds from such special account: (1) to pay the necessary expenses incurred by the Court in administering this Rule and (2) for such other purposes related to the regulation of the practice of law as the Court shall direct.

(i) Suspension of Membership. – On or before April 1 of each year, the Clerk of the Court shall issue by certified or registered mail at the address furnished pursuant to subsection b(i) of this Rule (or if no such address has been furnished at the last address known to the Court), to each member of the Bar who has failed to comply with this Rule, a rule to show cause why such member should not be suspended as a member of the Bar.

(j) Resignation. – Upon acceptance of the resignation by the Court, a member who resigns shall no longer be a member of the Bar.

FOR IMMEDIATE RELEASE:
12/12/02

CONTACT: Barbara S. Straczynski
Communications Coordinator
732-565-7561

NJSBA To Address Pollock Commission and Wallace Committee Reports Following Critical Study

NEW BRUNSWICK, NJ – The New Jersey State Bar Association will study and evaluate reports released today by the New Jersey Supreme Court from the Commission

on the Rules of Professional Conduct and the *Ad Hoc* Committee on Bar Admissions.

According to NJSBA President Richard J. Badolato, the reports will be sent to the appropriate committees. "The recommendations of the Commission and committee need to be critically studied and evaluated. It is the association's practice to ask relevant NJSBA committees to study, take positions and make recommendations to the Board of Trustees for appropriate action with regard to significant issues, and the Board has historically acted in accordance with the committee's advice. We cannot comment on the reports until we receive recommendations from these groups. In addition, we anticipate that bar representatives will appear to voice the association's position at public hearings scheduled by the Court for April 2003."

The New Jersey State Bar Association has already taken positions on many of the issues addressed in the reports such as eliminating the appearance of impropriety, municipal prosecutor restrictions, and the client/lawyer relationship. Moreover, the NJSBA has a well-defined position in support of the *bona fide* office rule that is currently the subject of litigation in the Supreme Court. The NJSBA's Professional Responsibility Committee will look at the Pollock Committee recommendations. The NJSBA committee previously submitted comments on the American Bar Association's (ABA) Ethics 2000 report.

"We will critically examine admission on motion, the MJP rule, and the ability of in-house counsel to get a limited license," said Badolato. "Both the Commission and Committee have an MJP proposal and they differ significantly. These need to be considered and appraised."

Other issues of concern are relaxed standards for foreign lawyers and graduates of non-accredited law schools taking the New Jersey bar exam.

"One of the consistent statistics repeated in the press is the large per capita number of lawyers in the state. Increasing this number by admitting more lawyers does not improve the quality of services to which the public has access," he said.

The Pollock Commission was appointed by the Court in January 2001 to review the Rules of Professional Conduct in light of the report of the American Bar Association's Ethics 2000 Commission on the Model Rules of Professional Conduct. The Commission also reviewed ethical issues concerning multi-jurisdictional practice, multidisciplinary practice, the appearance of impropriety rule, the extension of the disqualification of a municipal prosecutor from criminal defense work to members and associates in the prosecutor's law firm, and the rule requiring attorneys to maintain a *bona fide* office in New Jersey.

The Wallace Committee was created by the Court in February 2001 to make recommendations regarding a number of multi-jurisdictional practice and bar admissions issues. With regard to multi-jurisdictional practice, the NJSBA again has a well-defined position that was presented to both the ABA and Wallace Committee. The NJSBA supports a rule that will provide lawyer's with guidance as to what cross border activity may be permissible. However, the association believes such a rule should respect traditional restrictions on unauthorized practice. In addition, the Wallace Committee has addressed issues including admission by motion, admission to the bar examination by foreign-educated attorneys and non-accredited law

school graduates, regulation of in-house counsel and transactional attorneys, and multi-jurisdictional practice. Further, the Court asked the Committee to review and report on the continued use of the *bona fide* office rule.

The New Jersey State Bar Association, incorporated in 1899, is dedicated to the continuing education of lawyers and the public, to reforming and improving the legal system and to aiding in the administration of justice.

-NJSBA-

ROBERTSON, FREILICH, BRUNO & COHEN, LLC
One Riverfront Plaza – 4th Floor
Newark, New Jersey 07102
(973) 848-2100
Attorneys for Plaintiff, Boston University

BOSTON UNIVERSITY **Plaintiff,** **vs.** **UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY,** **Defendant.**	**SUPERIOR COURT OF NEW JERSEY, LAW DIVISION: ESSEX COUNTY DOCKET NO.: ESX-L-007302-01** **Civil Action** **CERTIFICATION OF ROBERT B. SMITH, ESQ.** (Filed Jun. 5, 2002)

I ROBERT B. SMITH, certify that:

1. I make this certification in support of plaintiff's motion for my admission *pro hac vice* to this Court, pursuant to New Jersey Court Rule 1:21-2.

2. I am a member in good standing of the bar of the highest court of the Commonwealth of Massachusetts, admitted in 1986.

3. I am a member of the United States District Court for the District of Massachusetts, the United States District Court for the Southern District of New York, the United States District Court for the Eastern District of New York, and the United States District Court for the District of New Jersey. In addition, I am admitted to practice and a member in good standing of the Bar of the

United States Courts of Appeal for the First, Second, and Third Circuits.

4. I am Associate General Counsel for Trustees of Boston University (the "University"), a Massachusetts charitable corporation, plaintiff in this proceeding, which seeks, *inter alia,* to recover certain sums due and payable to it pursuant to a valid and enforceable contract.

5. As the Associate General Counsel for the University, located at 125 Bay State Road, Boston, Massachusetts 02215, I have been requested by the Trustees of the University to assume joint responsibility in the above-captioned matter on behalf of the University with the firm Robertson, Freilich, Bruno, Cohen, LLC.

6. There are no pending disciplinary proceedings against me in any jurisdiction nor have any disciplinary proceedings been previously imposed against me in any jurisdiction. I understand that I have a continuing obligation during my admission *pro hac vice to promptly* advise the Court of the institution of any disciplinary proceedings against me.

7. I have reviewed the New Jersey Court Rules and shall comply with these rules, including the requirement to comply with *R.* 1:20-1(b), Disciplinary Jurisdiction, Annual Fee and Registration, and *R.* 1:28-2, Payment to the New Jersey Lawyers' Fund for Client Protection.

8. I respectfully request admission *pro hac vice* to the Bar of this Court.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Robert B. Smith
ROBERT B. SMITH

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF SUFFOLK June 3, 2002

Then personally appeared before me the above-named Robert B. Smith and acknowledged the foregoing instrument to be his free act and deed.

/s/ Stephen A. Williams
Notary Public
My commission expires: February 14, 2003

DAVID SAMSON
ATTORNEY GENERAL OF NEW JERSEY
Division of Law
124 Halsey Street
P.O. Box 45029
Newark, New Jersey 07101

By: Rhonda S. Farber
Deputy Attorney General
(973) 648-3808
Attorney(s) for Defendant/Third-Party Plaintiff

Boston University, Plaintiff, v. University of Medicine and Dentistry of New Jersey, Defendant/Third-Party Plaintiff, v. Altec Inc., Third-Party Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – ESSEX COUNTY DOCKET NO.: ESX-L-7302-01 CIVIL ACTION **CERTIFICATION IN OPPOSITION TO PRO HAC VICE APPLICATION** (ORAL ARGUMENT REQUESTED)

Rhonda S. Farber, of full age, certifies and says:

1. I am a Deputy Attorney General of the State of New Jersey, duly licensed to practice law before this Court.

2. I am responsible for the handling of the above-captioned matter and I am the attorney of record before the Court, with personal knowledge of the facts set forth below, which are submitted in support of Defendant/Third-Party Plaintiff, University of Medicine and Dentistry's

opposition to Robert B. Smith's application to this Court to be admitted to practice law in New Jersey *pro hac vice*.

3. The facts and exhibits set forth below and annexed hereto are submitted to support the legal argument that the Court has ample cause to deny application of Robert B. Smith to be admitted *pro hac vice*.

4. On June 17, 2002, I telephoned my adversary with an offer to withdraw my opposition upon his client's consent to, pre-admission, 1.) Satisfy whatever obligations the Lawyers' Fund For Client Protection requires and 2.) Pre-admission, submit to be deposed by me regarding material facts as detailed in the Certification to determine if he is a fact witness.

5. Mr. Smith is an employee of Boston University, the Plaintiff herein, in the office of General Counsel.

6. Annexed hereto and made a part hereof as **Exhibit A**, which is a three page document, is a true copy of an Order, dated September 2001, signed by Chief Justice Deborah T. Poritz, which states that Robert B. Smith is declared by the Supreme Court of New Jersey to be ineligible to practice law in New Jersey. Attached to the Order is a true copy of the Notice informing Mr. Smith of his ineligibility.

7. Mr. Smith's status as an attorney in New Jersey was inquired into at my request by Joseph Monteleone, a paralegal in my office. He contacted the New Jersey Lawyers' Fund for Client Protection, and the Director and Counsel to the Fund, Kenneth J. Bossong, responded in writing to that request. The first writing is dated May 23, 2002 and is annexed as **Exhibit B.** The second, is dated June 12, 2002 a true copy of which is annexed hereto and made a part hereof as **Exhibit C.** Mr. Bossong indicated in

his June letter, that Justice Poritz' Order (Exhibit A), is only the most recent of orders of ineligibility regarding Mr. Smith, dating back to June 17, 1986. (See also Rule 1:28-2).

8. Pursuant to express terms of the contract upon which Plaintiff bases its cause of action against my client, I requested an audit of books and accounts and supporting documents relating to invoices from Boston University to the University of Medicine and Dentistry of New Jersey ("UMDNJ"). A true copy of the April 16, 2002 letter is annexed hereto and made a part hereof as **Exhibit D.**

9. As a follow-up to the April 16 demand, I sent another letter, dated April 30, 2002, setting forth specifics in preparation for the audit. Said letter is annexed hereto and made a part hereof as **Exhibit E.**

10. Robert B. Smith responded to the audit demand one month later, with an unacceptably narrow counter proposition as to the conduct of the audit. A true copy of said letter, faxed to me on May 15, 2002, is annexed hereto as **Exhibit F.** My response to Smith's letter was addressed to counsel of record, and is dated May 16, 2002 and annexed hereto as **Exhibit G.**

11. Boston University, through its agent and employee, Robert B. Smith, is in material breach of an express term of the contract upon which the Plaintiff sues. Robert B. Smith is a material witness as to the breach of Clause 13, whom Defendant is entitled to depose on that subject, but not limited thereto.

12. Mr. Donner's Certification in support of this motion asserts that there are no legal issues for this Court's

consideration (Donner Certification, line 7). This is simply not the case.

13. Plaintiff's Counsel and Robert Smith have not even attempted to establish "good cause" for Smith's admission *pro hac vice* as required by R 1:21-2 (a) (3). Thus, on its face, this application is deficient.

14. As discussed at length in the enclosed memorandum, even where "good cause" has been established, the Court does not yield its discretion to consider other, countervailing issues in granting or withholding permission to admit *pro hac vice*.

15. For all of the foregoing reasons and for the legal arguments submitted herewith, it is respectfully requested that the motion to admit Robert B. Smith *pro hac vice* be denied.

I certify that the foregoing statements made by me are true and that the copies of documents annexed as Exhibits hereto are true copies. I am aware that if any of the statements made by me are wilfully false, I am subject to punishment.

Dated: June 18, 2002

/s/ Rhonda S. Farber
RHONDA S. FARBER
DEPUTY ATTORNEY
GENERAL

ROBERTSON, FREILICH, BRUNO & COHEN, LLC

One Riverfront Plaza – 4th Floor
Newark, New Jersey 07102
(973) 848-2100
Attorneys for Plaintiff, Boston University

BOSTON UNIVERSITY **Plaintiff,** **vs.** **UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY,** **Defendant.**	**SUPERIOR COURT OF NEW JERSEY, LAW DIVISION: ESSEX COUNTY DOCKET NO.: ESX-L-007302-01** **Civil Action** **CERTIFICATION OF ROBERT B. SMITH, ESQ.**

I ROBERT B. SMITH, certify that:

1. 1 make this certification in support of plaintiff's response to defendant's letter memorandum of law.

2. On the last page of her letter, Ms. Farber alleges the "refusal of plaintiff to comply with defendant's audit demand," and that I may be a witness to this alleged "fact." On the contrary, I was witness to no such thing.

3. On or about April 16, 2002, I received an audit demand from Ms. Farber (attached to her Letter Memorandum at Exhibit D). Shortly after receipt of this letter, I telephoned Ms. Farber to discuss its contents.

4. During the course of this telephone conversation, Ms. Farber and I agreed that as neither of us had knowledge of auditing practices and procedures, the appropriate course of action would be to have her auditors contact the

University's internal audit department to arrange details of the audit.

5. On or about April 30, 2002, I received from Ms. Farber another letter setting forth the scope of the requested audit (the content of which she had told me would be prepared by her proposed auditors but which she would put in the form of a letter from her). I provided a copy of this "scope letter" to the University's internal audit department for review. (Exhibit to the Letter Memorandum.)

6. On May 15, 2002, I wrote to Ms. Farber (Exhibit F to the Letter Memorandum) stating that the University "would permit an audit of the records pertaining to the projects described in the Agreement," but that the proposed scope would impose unnecessary and unreasonable burden on University personnel. In this letter, I offered an alternate method for Ms. Farber's auditors to choose records for review, and informed her that workspace and telephones would be made available to her audit team. I also advised her, that her auditors should contact the University's Associate Vice President for Internal Audit, and provided his name, address, and telephone number.

7. Our internal audit department has not been contacted by defendant's auditors.

8. At no time did I tell Ms. Farber that plaintiff had "refused" to comply with her audit demand.

9. The Trustees of Boston University have requested that I participate in the litigation of this matter along with local counsel. My client is a charitable educational institution and needs to minimize legal fees and costs whenever possible by relying upon the Office of General Counsel to represent it.

10. I have represented Boston University for 11 years as in-house counsel and am intimately familiar with its legal and business affairs.

11. I am surprised and rather disappointed that Ms. Farber would not accurately report the substance of our conversations concerning the audit to this Honorable Court.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Robert B. Smith
ROBERT B. SMITH

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF SUFFOLK June 19th, 2002

Then personally appeared before me the above-named Robert B. Smith and acknowledged the foregoing instrument to be his free act and deed.

/s/ Dorothy D. Accomandel
Notary Public
My commission expires: August 18, 2006

SUPREME COURT OF NEW JERSEY

STEPHEN W. TOWNSEND
CLERK
GAIL GRUNDITZ HANEY
DEPUTY CLERK

[SEAL]

OFFICE OF THE CLERK
PO BOX 970
TRENTON, NEW JERSEY
08625-0970

June 26, 2002

Deputy Attorney General Rhonda Farber
Office of the Attorney General
124 Halsey St., 5th Floor
P.O. Box 45029
Newark, NJ 07101

Dear Deputy Attorney General Farber:

You have inquired about the issuance of Certificates of Good Standing for members of the New Jersey Bar. In response, I have prepared a brief certification, which is attached. If you need anything further, please let me know.

Very truly yours,

/s/ Stephen W. Townsend

STATE OF NEW JERSEY :
: CERTIFICATION
COUNTY OF MERCER :

I, Stephen W. Townsend, do hereby certify to the following:

1. I am Clerk of the Supreme Court of New Jersey and have served in that capacity since 1977.

2. As Clerk of the Supreme Court I am authorized to issue Certificates of Good Standing to members of the New Jersey Bar who qualify for the same.

3. In issuing a Certificate of Good Standing, I am certifying, in part, that the attorney "is current with all assessments imposed as a part of the filing of the annual Attorney Registration Statement, including, but not limited to, all obligations to the New Jersey Lawyers' Fund for Client Protection." A sample Certificate of Good Standing is appended to this certification.

4. Attorneys who are not current with all obligations owed to the Lawyers' Fund for Client Protection are not eligible to receive a Certificate of Good Standing.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

/s/ Stephen W. Townsend
Stephen W. Townsend, Esquire
Clerk of the Supreme Court

Dated: June 26, 2002

SAMPLE

Supreme Court of New Jersey

[SEAL]

Certificate of Good Standing

This is to certify that (No.) was constituted and appointed an Attorney at Law of New Jersey on and, as such, has been admitted to practice before the Supreme Court and all other courts

of this State as an Attorney at Law, according to its laws, rules, and customs.

I further certify that as of this date, the above-named is an Attorney at Law in Good Standing. For the purpose of this Certificate, an attorney is in "Good Standing" if the Court's records reflect that the attorney: 1) is current with all assessments imposed as a part of the filing of the annual Attorney Registration Statement, including, but not limited to, all obligations to the New Jersey Lawyers' Fund for Client Protection; 2) is not suspended or disbarred from the practice of law; 3) has not resigned from the Bar of this State; and 4) has not been transferred to Disability Inactive status pursuant to Rule 1:20-12.

Please note that this Certificate does not constitute confirmation of an attorney's satisfaction of the administrative requirements of Rule 1:21-1(a) for eligibility to practice law in this State.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the Supreme Court, at Trenton, this day of , 20 .

/s/ Stephen W. Townsend
Clerk of the Supreme Court

NEW JERSEY LAWYERS' FUND
FOR
CLIENT PROTECTION

[SEAL]

RICHARD J. HUGHES JUSTICE COMPLEX
P.O. BOX 961
TRENTON, N.J. 08625-0961

[Names Omitted In Printing]

DATE: June 27, 2002

TO: Rhonda Farber, Deputy Attorney General

FROM: Kenneth J. Bossong

RE: Request for Certification on Pro Hac Vice Admission

Responding to your request, I have prepared a certification dealing with the Fund's area of authority in handling the annual assessment including pro hac vice admittees. Please let me know if there is an area of concern that I have missed.

KJB:sjb
Enclosure

NEW JERSEY LAWYERS' FUND
FOR
CLIENT PROTECTION

[SEAL]

RICHARD J. HUGHES JUSTICE COMPLEX
P.O. BOX 961
TRENTON, N.J. 08625-0961

[Names Omitted In Printing]

CERTIFICATION

I, KENNETH J. BOSSONG, of full age, hereby certify:

1) I am Director and Counsel to the New Jersey Lawyers' Fund for Client Protection (hereinafter "Fund").

2) The Fund receives money from New Jersey's lawyers and judges for the purpose of reimbursing victims of dishonest lawyers.

3) In that respect, I have ultimate responsibility for handling the annual assessment of New Jersey's lawyers.

4) Under *R.* 1:28-2, there is no exemption for lawyers simply on the basis of being out of state. The only exemptions available are: (a) being in one's first calendar year of admission; (b) being admitted 50 or more years; (c) retired completely from the practice of law; or (d) full time active duly [sic] with the military, vista or peace corps.

5) Any lawyer who is not eligible for one of the exemptions must pay the annual assessment in order to be in compliance with *R.* 1:28-2.

6) Lawyers who are not in compliance with the annual assessment are declared ineligible to practice law in New Jersey by Order of the Supreme Court of New Jersey. This Order with accompanying ineligible list is published in the New Jersey Lawyer and New Jersey Law Journal newspapers, and is distributed to the State's Assignment Judges. A notice of such Order is sent to the last known address for every person on the ineligible list.

7) I do not recall an instance in which a lawyer already on the ineligible list was admitted *pro hac vice*, given the requirement of *R.* 1:21-2(a) that such lawyer be "of good standing". Were it to happen and were such a

lawyer to send a payment for only the current calendar year despite other years of ineligibility, our office would credit the individual with the payment for the current year but would be without authority to reinstate that lawyers [sic] from the ineligible list until all amounts are paid in full.

I certify that the above statements are true. I am aware that if any of the above statements were to be wilfully false, I would be subject to punishment.

/s/ Kenneth J. Bossong
Kenneth J. Bossong

Dated: June 27, 2002